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In The
Supreme Court of the United States

OCTOBER TERM, 1968

MARKHAM ADVERTISING COMPANY, INC.; CASEY & STONE COMPANY; COLUMBIA BASIN OUTDOOR ADVERTISING CO.; NORTHWEST OUTDOOR ADVERTISING CORPORATION; OBIE OUTDOOR ADVERTISING, INC.; SUNSET OUTDOOR ADVERTISING COMPANY; YAKIMA VALLEY POSTER SERVICE, INC.; GROVER ADVERTISING INC.; individually and as a class, *Appellants,*

FOSTER AND KLEISER, Division of METROMEDIA, INC., *Plaintiff,*

vs.

THE STATE OF WASHINGTON; WASHINGTON STATE HIGHWAY COMMISSION AND THE HONORABLE MEMBERS THEREOF, CONSISTING OF ERNEST A. COWELL, CHAIRMAN; ROBERT L. MIKALSON, GEORGE D. ZAHN, JAMES M. BLAIR, SR., AND IRVING CLARK, JR., their Officers, Agents and Employees, *Appellees,*

IRA R. GRANT, *Intervenor,*

M. C. BEATIE AND TRANQUILLA KOZAK, *Additional Intervenors.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

ALFRED J. SCHWEPPE
THOMAS R. BEIERLE
Attorneys for Appellants

October 15, 1968
657 Colman Bldg.
Seattle, Washington 98104

THE ARGUS PRESS SEATTLE, WASHINGTON

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M. C. BEATIE AND TRANQUILLA KOZAK, *Additional Intervenors.*

JURISDICTIONAL STATEMENT

A. OPINIONS BELOW:

The only reported opinion below is that of the Washington State Supreme Court, filed March 26, 1968, reported at 73 W.D.2d 413 P.2d. . It is reprinted in Appendix F.

B. STATEMENT OF JURISDICTIONAL GROUNDS:

(i) Nature of Proceeding and Statute Under Which Brought

This action was brought as a class action by the named appellants and plaintiff, each engaged in the business of outdoor advertising in the State of Washington, to obtain a declaratory judgment (as permitted by Washington's Declaratory Judgment Act, RCW Chapter 7.24) that Washington State's Highway Advertising Control Act of 1961, as amended, RCW 47.42, Chapter 96, Laws of 1961, as amended by Chapter 3, Laws of 1963, Extraordinary Session, and the rules and regulations promulgated thereunder, are unconstitutional, and to enjoin, pendente lite and permanently, their enforcement.

The general purport of the Highway Advertising Control Act of 1961 is to require appellants to remove virtually all outdoor advertising signs within 660 feet of Interstate and designated "scenic" highways in this state under the guise of an exercise of the state's police power, without compensation.

This appeal is from a final juudgment of the Supreme Court of the State of Washington, affirming the trial court's judgment that the statute, and the regulations promulgated thereunder, are constitutional, against the claim that the statute and the reg-

ulations violate the Constitution of the United States in various particulars.

(ii) Date of Judgment and Other Relevant Dates

(1) Date of trial court (Thurston County, Washington, Superior Court) judgment: March 10, 1967.

(2) Date of affirmance by Washington State Supreme Court: March 26, 1968.

(3) Date of Washington State Supreme Court's Order Denying Petition for Rehearing and Changing Opinion: July 19, 1968.

(4) Date Notice of Appeal filed: July 23, 1968. The Notice of Appeal was filed with the Clerk, Washington State Supreme Court, Olympia, Washington.

(iii) Appellate Jurisdiction — Statutory:

This action draws in question the validity of a Washington State statute on the ground of its being repugnant to the Constitution and laws of the United States; the decisions of the trial court and the Washington State Supreme Court have been in favor of the validity of the statute.

This court therefore has jurisdiction of the appeal under 28 U.S.C. §1257(2).

(iv) Appellate Jurisdiction—Cases Believed to Sustain the Jurisdiction

(1) In general—*Michigan Central Railroad Company v. Michigan Southern Railroad Company,* 60 U.S. 378, 19 How. 378 at 379, 15 L.Ed. 689 (1856); *Standard Oil Company v. Johnson,* 316 U.S. 481 at

482, 62 S.Ct. 1168, 86 L.Ed. 1611 (1942); *American Oil Co. v. Neill,* 380 U.S. 451 at 455, 85 S.Ct. 1130, 14 L.Ed.2d 1 (1965); *Warren Trading Post Co. v. Arizona Tax Commission,* 380 U.S. 685 at 686, 85 S.Ct. 1242, 14 L.Ed.2d 165; and *Watkins v. Conway,* 385 U.S. 188 at 189, 87 S.Ct. 357, 17 L.Ed.2d 286 (1966).

(2) Supremacy of Federal Legislation — *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board,* 315 U.S. 740 at 743, 62 S.Ct. 820, 86 L.Ed. 1154 (1942); *Faitoute Co. v. Asbury Park,* 316 U.S. 502 at 507 *et seq.*, 62 S.Ct. 1129, 86 L.Ed. 1629 (1942). "Action of a state under its police power must give way by virtue of the Supremacy Clause". *Morris v. Jones,* 329 U.S. 545, 553; *Hines v. Davidowitz,* 312 U.S. 52.

(3) Violation of First Amendment Rights—*Jones v. Opelika,* 316 U.S. 584 at 591 *et seq.,* 62 S.Ct. 1231, 86 L.Ed. 1691 (1942); *Jamison v. Texas,* 318 U.S. 413 at 414, 63 S.Ct. 669, 87 L.Ed. 869 (1942).

(4) Denial of Due Process and Equal Protection—*Hoopeston Co. v. Cullen,* 318 U,S. 313 at 315, 63 S.Ct. 602, 87 L.Ed. 777 (1943).

(v) Statutes Involved:

(1) State Statute Challenged — The statute challenged is designated as the Highway Advertising Control Act of 1961. It was enacted as Laws of Washington, 1961, Chapter 96, p. 1575, *et seq.,* amended by Laws of Washington, 1963, First Extraordinary Session, Chapter 3, p. 1287 *et seq.,* and is codified as amended, in Revised Code of Washington (RCW) Chapter 47.42. Because of its length, the statute, in pertinent part, is reprinted in Appendix A.

The rules and regulations issued by the Washington State Highway Commission pursuant to the statute are also challenged. These are published in 3 Washington Administrative Code (WAC), Chapter 252-40. Because of their length, the pertinent portions of the rules and regulations are reprinted in Appendix B.

(2) Federal Statutes Involved

One of the main issues presented on this appeal is the invalidity of the state act by reason of the constitutional supremacy accorded more recent federal highway legislation. The highways in question are federal highways—federally subsidized to extent of 90%. Congress may "regulate that which it subsidizes". *Wickard v. Filburn* 317 U.S. 111, 131. The state court recognizes the right of Congress to regulate these highways but, notwithstanding the federal provision that payment is mandatory prior to removal of billboards, asserts the federal act is directory, not mandatory, and hence denies federal supremacy. The particular legislation which we claim is controlling, is the Highway Beautification Act of 1965, Public Law 89-285, approved October 22, 1965, 79 Stat. 1028, *et seq.,* partially codified as 23 U.S.C. §131, as recently amended by Section 6 of the Federal-Aid Highway act of 1968, Public Law 90-495, approved August 23, 1968, 82 Stat. 815 at 817. These statutes are reprinted in Appendices C and D, respectively.

Although it is not directly involved, a full understanding of the issues raised in this appeal also requires reference to an earlier federal act dealing with control of outdoor advertising; see Public Law 85-767, approved August 27, 1958, 72 Stat. 704, as amended by Public Law 86-342, approved on September 21, 1959, 73 Stat. 612.

C. Questions Presented:

The questions to be presented on this appeal are as follows:

1. Whether the federal Highway Beautification Act of 1965, is supreme and controlling over the 1961 state act by virtue of Article VI of the Constitution of the United States, particularly as to:

(a) Rejection of use of state's police power, and requirement that just compensation be paid before removal. § 101, 79 Stat. 1028 at 1029, 23 U.S.C. § 131(g) and § 401, 79 Stat. 1028 at 1033, not codified in U.S.C.; Senate Report No. 709, 89th Congress, first session, p.7; House Report No. 1084, 89th Congress, first session, p.7; Senate Report No. 542, 90th Congress, first session, p.10; House Report No. 713, 90th Congress, first session, p.5. These House and Senate Reports, all brought to the attention of the state courts, show that the word "shall" is *mandatory*. "Such payment is mandatory, not permissive, on the states". (Senate Report 709, *supra*), "The Committee emphatically and unanimously rejects the use of the police power in acquiring these rights." Ibid.

(b) Time of removal — 1970 instead of 1965 — (§101, 79 Stat. 1028 at 1029, 23 U.S.C. §131(e)).

(c) Billboards in commercial and industrial areas—protected by the federal statute, not by the state statute — (§101, 79 Stat. 1028, 23 U.S.C. §131(d); note that this section has recently been amended by section 6 of the Federal-Aid Highway Act of 1968, Public Law 90-495, approved August 23, 1968, 82 Stat. 815 at 817).

This issue of federal supremacy, if decided favorably to appellants, would be dispositive of all the other issues in this case, as it would render the 1961 state act wholly unenforceable.

2. Whether the 1961 state act is an abridgement of the free speech guarantees of the First Amendment to the Constitution of the United States, which by virtue of the Fourteenth Amendment, are binding on the states, and particularly whether the restrictions on speech violate the special protection which First Amendment rights have in relation to the equal protection clause of the Fourteenth Amendment. This question is wide open in this court and has "never been authoritatively determined". Mr. Justice Douglas in *Cammorano v. U.S.*, 358 U.S. 498, 513, footnote.

3. Whether the 1961 state act and the rules and regulations promulgated thereunder are so arbitrary and discriminatory as to deny to appellants the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution, since the state act permits many billboards, on-premise (which are not affected at all) and other off-premise boards similar to plaintiffs', to remain along these federally supported highways.

4. Whether the 1961 state act in itself is an improper exercise of the police power, as applied to a "legitimate business" (so found by Congress) not harmful in itself and not shown to be a nuisance in fact, and whether under the due process clause of the Fourteenth Amendment such a then existing legitimate business can be destroyed even under the state's police power without just compensation — an open question in this court.

D. STATEMENT OF THE CASE:

I. Federal Questions:

All federal questions presented here were raised

initially in the complaint and amended complaint, were ruled on by the trial court in its memorandum opinion, Findings of Fact and Conclusions of Law and Judgment. The questions were presented again to the Washington State Supreme Court on appeal and the trial court's disposition of those issues affirmed. The federal questions presented have been the substance of this litigation since its inception.

A synopsis of the rulings of the Washington State Supreme Court's rulings on the questions presented on this appeal follows—

(a) On supremacy of the federal act (Supremacy Clause, Art. VI):

> "Plaintiffs first contend that Congress, by the 1965 federal statute, *supra,* intended to displace contrary or inconsistent provisions in the laws of this state, and in that respect has preempted, under the supremacy clause of the federal constitution, this field of legislation. Their argument in support of this contention is based both on the conflicts between the federal statute and RCW 47.42, and on the allegedly mandatory language employed by Congress. The federal statute says, "just compensation shall be paid upon the removal of . . . outdoor advertising signs, displays, and devices" 23 U.S.C. §131(g) (Supp. II, 1967); while the state law provides for regulating billboards under the police power, without requiring the payment of compensation for any losses caused. Plaintiffs maintain that the quoted language is mandatory, and claim that §401, Pub. L. No. 89-285, *supra,* supports their conclusion. 73 W.D.2d at 425-426."
>
> ". . . We hold that Congress has not invoked the supremacy clause by preempting the field of regulation covered by the state Act; that 23 U.S.C.

§131 (Supp. 11, 1967) is directory, and does not interfere with the application of the Act as written. 73 W.D.2d at 427."

Note: The state court by-passed the *mandatory* federal provisions, which it had just quoted and, referring to other permissive features of the federal act, oddly and erroneously held that the *whole* act was directory.

(b) On free speech (First Amendment):

"This intrusive quality of highway outdoor advertising, coupled with the hazard it poses to traffic safety and its purely commercial nature, all persuade us that RCW 47.42 is a reasonable regulation which does not violate the First Amendment. There is no blanket requirement that the legislature must subordinate all other legitimate public interests to the protection of free speech. 73 W.D.2d at 437."

(c) On equal protection (Amendment XIV):

"The plaintiffs contend that the Act is contrary to the equal protection clause of the Fourteenth Amendment to the federal Constitution and the privileges and immunities clause of the state constitution . . ."

* * *

". . . We have considered all of the objections raised, and we agree with the trial court that these classifications are reasonable. We can conceive of a state of facts which justifies every classification here attacked, and this requires us to uphold the Act and the Regulations. 73 W.D.2d at 435, 436."

(d) On police power and due process (Amendment XIV):

> "We hold that the purposes of the Act as expressed in RCW 47.42.010, *supra*, are within the legitimate scope of the police power."
>
> * * *
>
> "Plaintiffs further contend that the Act deprives them of due process of law because it authorizes the taking of their property without compensation. U.S. Const. Amend. 14; Art. 1, §3. When a court determines, as we have in this case, that the police power has been properly invoked, there is no basis for this contention. 73 W.D.2d at 432 and 434, 435."

The latter is contrary to well decided cases which hold that even though a legislature under its police power may require removal of certain structures, a police power statute cannot operate retroactively to require removal of a structure which is not a nuisance in fact and deny the owner just compensation. The attempt to do so is wholly confiscatory in violation of due process of law.

Opinion of the Justices, 169 A.2d 762, 765 (N.H. 1961)

State Highway Dept. v. Branch, 152 S.E.2d 372, 373-4 (Ga. 1966)

General Outdoor Advertising Co. v. Indianapolis, 172 N.E. 309, 313-314 (Ind. 1930)

Stoner McCray System v. Des Moines, 178 N.W.2d 843, 849-850 (Iowa, 1956)

Vermont Salvage Corp. v. St. Johnsbury, 133 Vt. 341, 34 A.2d 188, 196 (1943)

This is the proper view under the Fourteenth Amendment, according to some of these state cases. The question is open in this court.

2. Synopsis of Statutes Involved:

In 1958, Congress passed the first federal legislation relating to the control of outdoor advertising on fededal subsidized highways which has any relation to the issues in this action. 72 Stat. 704, as amended by 73 Stat. 612. It

(1) Declared a national policy for encouraging and assisting the states in the elimination of outdoor advertising signs within 660 feet of the edge of the right-of-way of Interstate highways, subject to specified exceptions.

(2) Authorized the Secretary of Commerce to enter into agreements with each state to carry out this policy.

(3) Provided a bonus highway-aid payment to those states which entered into such agreements.

(4) Authorized pro-rata reimbursement to the states for costs incurred in acquiring advertising rights.

Washington State's Highway Advertising Control Act of 1961, which is challenged here, was enacted for the explicit purpose of taking advantage of the bonus provisions of the 1958 federal billboard control legislation. Except as certain implementation dates were amended during the 1963 extraordinary session of the legislature, the state Act remains intact.

The salient points of the state Act are:

> "(1) Prohibits all signs within 660 feet of interstate highway right-of-way except directional signs, for sale or for lease signs, public interest signs, and some signs, conforming to certain requirements, advertising activities within twelve

miles of the sign locations, which includes on-premises signs (R.C.W. 47.42.020(6) and .040);"

"(2) Prohibits all signs within 660 feet of "scenic highways" (specified in the Act) except directional signs, for sale or for lease signs, and on-premise advertising signs (R.C.W. 47.42.020 (7) and .040);"

"(3) Declares all prohibited signs to be a public nuisance, provides for their abatement without compensation, and provides criminal sanctions (R.C.W. 47.42.080);"

"(4) Requires a state-issued permit to be purchased for and attached to all off-premise advertising signs (R.C.W. 47.42.120);"

"(5) Requires, as amended, removal of all prohibited signs by March 11, 1964, except those in commercially or industrially zoned areas of cities and towns, where the removal date is March 11, 1965 (R.C.W. 47.42.100, as amended)."

The removal requirement of 660 feet beyond the edge of the right-of-way, while in form a regulation, is in fact a confiscation, because none of the standard signs involved are of any use 660 feet from the edge of the right-of-way (St. 169, 545; Ex. 37, P.4).

The federal Highway Beautification Act of 1965 amended the 1958 federal act, after which the 1961 state Act was patterned, and modified the former federal act in many important respects. It is the 1965 federal act which appellants assert is supreme over the inconsistent provisions of the state act, particularly as to rejection of the use of police power in favor of compensating the owners, time of removal, and allowance of signs in commercial and industrial areas. Among the significant points of the 1965 federal act are the following:

"(1) Prohibits all signs within 660 feet of interstate and primary highway rights-of-way except directional and public interest signs, for sale and for lease signs, and on-premise advertising signs (23 U.S.C.A. §131(c));"

"(2) Permits certain advertising signs within areas zoned or used for commercial or industrial purposes (23 U.S.C.A. §131(d));"

"(3) Permits information signs of interest to the traveling public at intersections along the interstate highway (23 U.S.C.A. §131(f));"

"(4) Requires just compensation be paid for all signs removed which were lawfully in existence on October 22, 1965 (23 U.S.C.A. §131(g); 401);"

"(5) Invokes a 10% penalty on federal aid highway funds if a state does not effectively control outdoor advertising pursuant to the standards of this act (23 U.S.C.A. §131(b));"

"(6) Provides a removal date of July 1, 1970, for all signs lawfully in existence on September 1, 1965 (23 U.S.C.A. §131(e))."

The rules and regulations adopted by the Washington State Highway Commission to implement the 1961 state act are too many and varied to permit accurate summarization. Suffice it to say that they, in addition to refining general size and spacing requirements, undertake to add some restrictions not apparent in the act itself, including the fixing of the relative sizes of print for local and national advertising copy (the standards differ), and adding a provision authorizing the revocation of a sign permit for violation of the act or regulations.

3. Resume of Pleadings and Proceedings:

The original complaint filed on February 26, 1964,

alleged that the appellees, who were charged with the administration and enforcement of the Highway Advertising Control Act of 1961 (hereinafter the "Act" or "state Act"), had adopted rules and regulations implementing the Act, and pursuant thereto had ordered appellants to remove, alter or move certain of their advertising signs and structures by March 11, 1964. The complaint alleged that the Act and the rules and regulations promulgated thereunder were unconstitutional (on grounds later refined by amended complaint), and prayed for a declaratory judgment to this effect, and for a temporary injunction restraining the respondents from enforcing the Act *pendente lite.*

On March 9, 1964, the court entered a temporary injunction against the enforcement of the Act.

By their answer, appellees admitted their intention to enforce the Act, and denied substantially all of the balance of the allegations of the complaint.

On January 20, 1966, appellants filed an amended complaint, which was subsequently revised pursuant to a pre-trial order to raise the issue of whether the federal Highway Beautification Act of 1965 controlled over inconsistent provisions of the state Act by virtue of the supremacy clause of the federal constitution.

The amended complaint, as revised, restates the basic allegations of the original complaint, but adds that each sign was lawfully constructed, that many are in industrially or commercially zoned or used areas, and that the present fair market value of the signs exceeded $1,000,000. It further alleges that the signs do not constitute a public nuisance as declared by the state Act, that the Act imposes unreasonable and unnecessary restrictions upon a business, not harmful in itself, which is conducted on private property owned

or leased by appellants, and that it arbitrarily and improperly invades the rights of the appellants under the guise of police power. It alleges that the state and federal constitutions are violated in that the Act is an improper exercise of the state's police power, abridges freedom of speech and press, deprives the appellants of their property without just compensation (also in violation of the federal act, which is controlling), and deprives appellants of equal protection of the law and abridges privileges and immunities guaranteed to them under the state and federal constitutions.

Appellants' prayer requested appropriate relief.

Whether appellants are entitled to just compensation from the state in an inverse condemnation proceeding was reserved in a pre-trial order dated March 28, 1966, stating, in part, that the court would

> "... reserve and not rule on whether there is a right to inverse condemnation for just compensation when any outdoor advertising structures are actually removed."

Hence this is not an issue on this appeal.

Respondents filed answers to the amended complaints, and the amended complaint as revised, admitted most of the jurisdictional matters, and denied the balance of the allegations.

The issues raised by the pleadings which were presented to the trial court were:

(1) Whether by virtue of the supremacy clause of the federal constitution, the 1965 federal act prevails over the 1961 state Act.

(2) Whether the 1961 state Act was a constitutional

exercise of the state's police power.

(3) Whether the 1961 state Act violated the equal protection clause of the 14th Amendment to the federal constitution, or the privileges and immunities clause of the state constitution.

(4) Whether the 1961 state Act violated the due process clauses of the federal and state constitutions.

(5) Whether the 1961 state Act violated the freedom of speech guarantees of the federal and state constitutions.

(6) Whether the 1961 state Act unlawfully delegated legislative power.

Trial of the cause commenced before the court, without a jury, on March 22, 1966. The trial lasted 15 days. Testimony from 26 witnesses was received, and 122 exhibits were admitted into evidence. The Statement of Facts exceeds 1900 pages. Final arguments were completed on May 11, 1966.

The court's memorandum opinion, ruling in appellees' favor on all issues of law was filed on August 19, 1966. After further proceedings, Findings of Fact, Conclusions of Law and Judgment declaring the Act and the rules and regulations promulgated thereunder constitutional, under both the state and federal constitutions, and dissolving the temporary injunction against appellees, were entered on March 10, 1967. A Notice of Appeal to the Washington State Supreme Court was filed on behalf of all plaintiffs on March 13, 1967, and the temporary injunction thereafter reinstated except as to certain signs not material here.

During the course of the proceedings, Ira R. Grant (an owner of an advertising sign in Thurston County)

and M. C. Beatie and Tranquilla Kozak (owners of real property in Cowlitz County on Interstate Highway No. 5, who leased a portion thereof for the purpose of allowing outdoor advertising structures to be erected and maintained thereon), were permitted to intervene on behalf of appellants. Their pleadings and appellees' response thereto were parallel to the principal pleadings in the action. None of the intervenors has appealed from the judgment, which was also adverse to them.

The Washington State Supreme Court affirmed the judgment of the trial court on all issues, 73 W.D.2d 413. The gist of the court's rulings on the questions here presented has been stated above. Appellants' petition for rehearing was denied except as to one change in the language of the court's opinion. (See Appendix G) This appeal followed. The state court has stayed the judgment below pending disposition of this appeal.

4. Statement of Facts:

During the course of the trial, in order to expedite it, appellants and appellees entered into a stipulation as to certain facts. (Exhibit 37) Those stipulated facts which are pertinent to this appeal, and the parties hereto, in the past here material follow:

I.

> "The plaintiffs [except intervenors] are at all times material to this lawsuit, engaged in the business of outdoor display advertising, with plants located in the State of Washington. The term "plants" in respect to each such plaintiff includes outdoor advertising signs and structures which plaintiffs own and use for outdoor advertising purposes. Said advertising company plaintiffs are lessees of land and not primarily owners of land, for the purpose of outdoor advertising

... [T]he terms of such leases are generally one to ten years."

III.

"The defendants are officials, agents and employees of the State of Washington, a sovereign state of the United States; and its legislature has enacted the law which is the subject matter of this action, being the Highway Advertising Control Act of 1961, ch. 96, Laws of 1961 as amended by ch. 3, Laws of 1963 Ex. Sess. (RCW 47.42). Neither the State of Washington nor any of the defendants has acquired any right, title or interest in any of the signs or sign structures owned by any of the plaintiffs or intervening plaintiffs."

IV.

"The Washington State Highway Commission is an administrative agency of the State of Washington and is responsible for the administration enforcement of the Highway Advertising Control Act of 1961 as amended. On the 18th day of May, 1961, the Washington State Highway Commission adopted rules and regulations implementing said act, a copy of which rules and regulations had been admitted in evidence as plaintiffs' Exhibit Number 4."

V.

"All of the advertising company plaintiffs are owners of signs and advertising structures and their plants include signs and structures which are located adjacent to and within 660 feet of the interstate routes and the scenic routes as described in the Highway Advertising Control Act as amended, and the regulations of the Washington State Highway Commission and are also owners of signs and advertising sign structures

located adjacent to and within 660 feet of federal aid primary routes within the State of Washington . . ."

VI.

"All of the signs involved in this litigation were erected in their present locations prior, and in most instances several years prior, to the enactment of the Highway Advertising Control Act of 1961 at which time no state law or state regulation precluded the erection and maintenance of such signs."

"Some of the sign structures of the advertising company plaintiffs involved in this litigation are located in rural areas; some are located in suburban areas outside the corporate limits of cities and towns; some are located within the corporate limits of cities and towns; and some are located within areas where the land is zoned for commercial or industrial use or where the land use is industrial or commercial in character."

"The advertising structures are customarily located along the high volume roads, streets and highways in positions deemed best able to attract the attention of the motorist. Signs not so located have little value for advertising purposes."

"None of the plaintiffs' signs on the Interstate or Scenic routes advertise activities conducted upon the premises upon which they are located."

VIII.

"The advertising structures of the advertising company plaintiffs required to be removed by the state act are primarily standard poster panels of approximately 300 square feet of advertising face for posting and changing messages. However, some of the affected signs are painted bulletins of

approximately 600 square feet or over. All such structures are standardized in method of construction and component parts."

IX.

"The defendants, acting pursuant to the Highway Advertising Control Act of 1961 as amended, and the regulations promulgated thereunder, have ordered all of the advertising company plaintiffs and the intervening plaintiffs, by letters such as those attached as Exhibits "A" and "B" to the revised amended complaint, to remove those of their signs above described from within 660 feet of the controlled highways as described in such state act and regulations. In each instance the conflict with the law or regulations or reasons for requiring removal of such sign was sufficiently stated in such letters. All parties agree that such notices received constitute adequate notice under the applicable law and regulations."

X.

"For varying reasons the advertising company plaintiffs are required to and regularly do relocate approximately 1½ to 10% of their sign structures annually. Such structures are depreciated for business and tax purposes over periods varying from 7 to 12½ years."

XI.

"Regarding the advertising company plaintiffs, the advertising structures on the Interstate or Scenic routes represent only a segment of each such plaintiff's plant, and such advertising structures are used for advertising of primarily national, but some local, products by primarily national, but some local, advertisers. Said structures are also used for the purpose of conveying public

messages by persons in public and private life, by churches and others. Said advertising structures are used as channels of communication, mostly commercial in nature, which reach many thousands of people every day. Also, the outdoor advertising company plaintiffs act as distributor for advertisements, political thought and messages, religious thought and messages, community thought and messages, and pleas of charitable organizations, and offer their facilities to the public for distribution of communications of all types."

XII.

"The defendants, unless restrained by the court, intend to enforce the provisions of the Outdoor Advertising Control Act of 1961, and the regulations promulgated thereunder without offering or giving compensation to any of the plaintiffs."

VIII.

"Defendants have issued permits for most of the plaintiffs' outdoor advertising structures annually for each of the years 1961 through 1966. These include the signs upon which removal notices have been given as specified in paragraph IX hereof."

* * *

XVII.

"The plaintiffs in this action, the intervening plaintiff, Ira R. Grant, and the additional intervening plaintiffs, M. C. Beatie and Tranquilla Kozak, hereinafter referred to as the "plaintiff group," by reason of the enforcement of the Highway Advertising Control Act of 1961 . . . as to advertising structures located along the Interstate and Scenic highways presently included under said act, will suffer a substantial loss in the aggregate amount of not less than $150,000.00."

"Fully reserving to the defendants their standing objection to the relevancy, competency and materiality in this action of any losses to plaintiff group through the enforcement of said state act if the state act should be amended to affect all advertising structures located along the Primary highway system, it is further stipulated that the plaintiff group will suffer a substantial additional loss of not less than $1,000,000.00."

"IT IS FURTHER STIPULATED that the foregoing amounts set forth in this paragraph XVII are agreed to for the purposes of this case only . . ."

XVIII.

"Plaintiff advertising companies own or operate with their plants within the State of Washington a total of about 7,631 advertising structures. Of this number not less than 470 such structures will be affected by the Highway Advertising Control Act of 1961. If that state act should be amended to affect all advertising structures located along the present Primary system, approximately 2,500 additional structures would be affected."

E. SUBSTANTIAL NATURE OF FEDERAL QUESTIONS:

This appeal raises several novel questions which have never been passed on by the United States Supreme Court. Each question is substantial, both in terms of importance as a matter of law, and in terms of the impact this legislation will have on this legitimate industry, and each supports acceptance of jurisdiction under 28 U.S.C. §1257(2) under the cases previously cited.

1. SUPREMACY OF THE 1965 FEDERAL STATUTE:

The supremacy of the 1965 federal legislation in rejecting the states' use of police power to achieve legislation and control of outdoor advertising has never been ruled upon by this court. The issue was apparently argued before the court in *State Highway Department v. Branch,* 222 Ga. 770, 152 S.E.2d 372 (1966), and resolved in favor of supremacy of the 1965 federal act. The Washington court has rejected the authority of that case. 73 W.D.2d at 434.

The only other reported decision involving the provisions of the 1965 federal act does not concern the issue of federal supremacy. See *Southeastern Displays, Inc. v. Ward,* 414 S.W.2d 573 (Ky., 1967).

We submit that the Washington court has patently erred, and that this error is demonstrable from the language of the act ("just compensation shall be paid," "Nothing in this Act . . . shall be construed to authorize private property to be taken . . . without just compensation) and the legislative history, both in House and Senate committee reports legislative debate. *"The committees emphatically and unanimously reject the use of police power in acquiring these rights . . . such payment is mandatory, not permissive, on the states."* Senate Report No. 709, 89th Congress, first session, p. 7; House Report No. 1084, 89th Congress, first session, p. 7; Senate Report No. 542, 90th Congress, first session, p. 10; House Report No. 713, 90th Congress, first session, p. 5.

The impact of the 1965 federal act, if held to be supreme, would be substantial, as it would, among other things:

(a) Reject as invalid non-compensatory police power removal under the state act, and provide for just compensation on sign removal;

(b) Provide a later removal time (1970) than the state act (immediate) on those signs lawfully in existence on September 1, 1965, as most of appellants' signs involved here were;

(c) Permit signs in commercial and industrial areas without regard to distance limitations.

In passing on this question the Washington court explicitly recognized, even quoted, the mandatory language in the 1965 act requiring just compensation to be paid. 73 W.D.2d at 421. This mandatory language, found in §131(g) reads,

> "(g) Just compensation shall be paid upon the removal of the following outdoor advertising signs, displays, and devices —
>
> "(1) those lawfully in existence on the date of enactment of this subsection,
>
> "(2) those lawfully on any highway made a part of the interstate or primary system on or after the date of enactment of this subsection and before January 1, 1968, and
>
> "(3) those lawfully erected on or after January 1, 1968."

The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

> "(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and
>
> "(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon."

The mandate appears again in §401:

> "SEC. 401. Nothing in this Act or the amendments made by this Act shall be construed to authorize private property to be taken or the reasonable and existing use restricted by such taking without just compensation as provided in this Act."

In the face of the mandatory language, the Washington court strangely held "that the purpose of the federal statute is obviously to induce the states to act, not to require them to do so," and that the federal act was simply "directory" and not mandatory. 73 W.D. 2d at 427.

Oddly, the state court, after quoting *the mandatory* provisions of the federal statute completely bypassed them, and, referring to other permissive features of the federal act, held that the *whole* federal act was directory. In so doing the state court disregarded the clear text of the statute itself, and ignored the Senate and House reports unqualifiedly expressing that mandatory intent.

A reading of the 1965 federal act will show that the holding of the Washington court is patently erroneous, and should be summarily reversed on this issue alone. We note that a ruling in favor of the appellants on this issue would be dispositive of all the other issues in the case, as it would render the state act wholly unenforceable and unworkable.

2. VIOLATION OF FIRST AMENDMENT RIGHTS:

The degree of free speech protection to be accorded commercial advertising is open in this court and has "never been authoritatively determined." Mr. Justice Douglas in *Cammarano v. U.S.*, 358 U.S. 498, 513, [9] footnote.

In *Valentine v. Chrestensen,* 316 U.S. 52, 86 L.Ed. 1262, 62 S.Ct. 920 (1940), a case involving the distribution of hand bills on public streets, Mr. Justice Roberts, writing for the court recognized the appropriate general rule.

> "This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares . . ."

but followed it with the statement:

> " . . . We are equally clear that the constitution imposes no such restraint on government as respects purely commercial advertising . . . (316 U.S. at 54).

This statement, as noted by Mr. Justice Douglas' concurring opinion in *Cammarano v. United States,* 358 U.S. 498 at 514, 3 L.Ed.2d 462, 79 S.Ct. 524 (1959), "has not survived reflection." Justice Douglas further observed:

> "The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise. Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive."

This observation is borne out by the application of first amendment protection to other forms of enterprise. See *Grosjean v. American Press Co.,* 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936), holding a tax

on advertising revenues to be violative of the First Amendment, *Thornhill v. Alabama,* 310 U.S. 88, 84 L.Ed. 1093, 60 S.Ct. 736 (1940), holding that picketing to redress labor grievances was protected by the First Amendment, as well as recent obscenity cases such as *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1962) and *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1964).

Billboard advertising as a means of exercising free speech must be viewed in the context of the stipulation heretofore referred to and quoted to the effect that:

> "Such advertising structures are used for advertising of primarily national, but some local, products by primarily national, but some local, advertisers. Said structures are also used for the purpose of conveying public messages by persons in public and private life, by churches and others. Said advertising structures are used as channels of communication, mostly commercial in nature, which reach many thousands of people every day. Also, the outdoor advertising company plaintiffs act as distributors for advertisements, political thought and messages, religious thought and messages, community thought and messages, and pleas of charitable organizations, and offer their facilities to the public for distribution of communications of all types. (Joint Stipulation, Ex. 37).

Nor is there in the instant case any clear and present danger of destruction of life or property, invasion of the right of privacy, or breach of the peace, or indeed of *any* serious substantive evil which would justify the legislation. *Edwards v. South Carolina,* 372 U.S. 229, 9 L.Ed.2d 697, 83 S.Ct. 680 (1963). There is here no finding that any outdoor advertising structure is a nuisance, in fact or *per se.* At best there is only

"implicit" finding, demonstrably false, that there is a relationship between highway traffic safety and the presence of outdoor advertising structures.

The state conceded that it knew of no instance in which an accident had ever been attributed to the presence of a billboard, and offered no proof of any.

Because this state act, and the rules and regulations promulgated under it, permit some signs and prohibit others, require local advertisers to use one size print and national advertisers another, etc., there is also a substantial question as to whether the state act, as implemented, violates the equal protection clause of the Fourteenth Amendment, which forbids classification of free speech even where there may appear to be a rational basis for doing so. See *Board of Education v. Barnette,* 319 U.S. 624 at 639, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) and *Adams v. Hinkle,* 51 Wn.2d 763 at 784 *et seq.,* 322 P.2d 844 (1958).

The Washington court nevertheless affirmed the trial court's holding that the First Amendment was not violated by holding that the act was "a reasonable regulation" relying on the quotation from Mr. Justice Roberts quoted above which has already been characterized by Mr. Justice Douglas as not having "survived reflection." That is not sufficient to justify an infringement of freedom of speech, especially discrimination in its exercise.

The permits which must be obtained before a message may be displayed, and the reporting of changes in the advertising copy prior to making the change, and which permits are revocable by appellees for failure of the sign to conform to the regulations (and may also subject the permittee to criminal prosecution) are also a form of unconstitutional prior restraint. *Lovell*

v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938).

All of these first amendment questions, not presently determined in the context of commercial off-highway advertising are so substantial as to warrant full briefing and consideration by this court.

3. DENIAL OF EQUAL PROTECTION:

A part of the equal protection argument is implicit in the discussion of the free speech issue; it alone is sufficiently substantial to warrant the court's acceptance of jurisdiction.

In addition, the act and the rules and regulations promulgated thereunder are replete with instances of wholly arbitrary discrimination, which the Washington court dismissed with discussion.

> "We can conceive of a state of facts which justifies every classification here attacked, and this requires us to uphold the Act and the Regulations. 73 W.D.2d at 436.

But, there is no reasonable basis for the distinction made as to those signs which fall into the prohibited classes, and those which do not; the "classification" itself is so inconsistent and discriminatory that it is impossible to discern a class at all.

As examples:

(1) The act would permit an "on-premise" sign, while outlawing the same sign on an adjacent piece of property.

(2) The act singles out the business of outdoor advertising by partially prohibiting it in commercial and industrial areas where all other legitimate busi-

nesses may operate.

(3) Requires national advertisers to conform to limitations on letter size, while such limitations do not apply to local advertisers.

(4) Permits off-premises signs advertising local businesses, whereas a sign in the same location which advertised a national business would be prohibited.

(5) Non-located activities, such as political and charitable messages, are prohibited because they have no "location."

Further examples are legion; these suffice to show the range of discrimination in effect. Discrimination of this sort cannot be justified by different business characteristics when it has no reasonable relation to those differences, nor to the purposes of the statute. *Morey v. Doud,* 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 485 (1957).

The test set out in *Walters v. St. Louis,* 347 U.S. 231 at 237, 98 L.Ed. 660, 74 S.Ct. 505 (1954) is not satisfied:

> "Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary."

4. DENIAL OF DUE PROCESS OF LAW:

The due process issue is raised as the concommitant of the state act's being an invalid exercise of the police power. The argument directed to the inappropriateness of this means of "regulating" the outdoor adver-

tising business is separate from that raised in the federal supremacy argument, *supra,* as here the invocation of the police power is challenged on the grounds that it far exceeds the historical bounds of that doctrine.

Appellants' arguments proceed from the unchallenged premise that outdoor advertising is a "legitimate business," "an integral part of the business and marketing function and an established segment of the national economy." Senate Report 709, 89th Congress, first session, p. 6, on S. 2084, later the federal Highway Beautification Act of 1965. As such, it is not a nuisance *per se.* Nor is there any finding in this case that any sign is a nuisance in fact, which would provide a basis for the exercise of police power.

Appellants' business and structures affected are existing uses of private property. Removal of those structures destroys the value of the structures, impairs the value of the business and destroys the income-producing value of much of the land on which the signs are located. This business is conducted on private, not public, property.

The only support the Washington court found for this exercise of police power was the "implicit" finding of the trial court that there was a substantial relationship between traffic safety and the presence of highway outdoor advertising. A review of the trial court's Findings of Fact and Conclusions of Law clearly shows that the trial court never made a finding of a substantial relationship between traffic safety and outdoor advertising. Its finding (No. VII) merely says that there is "sufficient evidence to show that reasonable men could find that a relationship does exist . . . "; ***but there is no finding that it does exist, or that it is substantial.*** (Emphasis ours.) Rather, as noted in the court's Conclusions of Law (Nos. II and

III), the court concluded: "There appears to be considered opinion both *pro* and *con,*" and that "reasonable minds may differ as to whether the facts as found herein justify the exercise of the police power." Surely this does not accord with the requirement of a substantial relation to the object of the legislation, as set out in *Mugler v. Kansas,* 123 U.S. 623 at 661, 8 S.Ct. 273, 31 L.Ed. 205 (1887), and the line of cases since.

Nor is the police power properly invoked when it does not affect alike all persons similarly situated. *Mountain Timber Co. v. Washington,* 243 U.S. 219 at 237, 239, 37 S.Ct. 260, 61 L.Ed. 685 (1917).

Although ignored by the trial court, the state Supreme Court also mentioned that exercise of police power might be justified on the grounds of aesthetics. Whether aesthetics, as a sole ground, is a proper basis for invoking police power has never been answered by this court. The ruling of the Washington court would transform what has historically been a doctrine of necessity into one of nicety, a transformation which has most serious implications to all property owners in this country. This question, if reached, is alone so great, and the arguments so many, that it deserves to be briefed and argued in full.

If the state act is not a valid exercise of the police power, removal without compensation is thus patently a violation of due process, surely a matter of sufficient substance to warrant this court's exercise of jurisdiction in this cause.

Moreover, as pointed out earlier, with citation of cases, even if the state can compel the removal of billboards existing at the time of the passage of the state act and at all times since, even a state police power statute cannot operate retroactively to require

removal of a structure which is not a nuisance in fact, without requiring just compensation to the owner.

This raises a federal question under the Fourteenth Amendment decided favorably to appellants' position in some state courts but not heretofore determined by this court.

F. OPINIONS AND JUDGMENT APPEALED FROM:

The trial court's memorandum opinion dated August 18, 1966 is printed in Appendix E; the state Supreme Court's opinion filed March 26, 1968, and reported at 73 W.D.2d 413, is reprinted in Appendix F, and the latter court's Order Denying Petition for Rehearing and Changing Opinion is reprinted in Appendix G. The judgment of the trial court is printed in Appendix H.

Respectfully submitted,

ALFRED J. SCHWEPPE
Counsel of Record

THOMAS R. BEIERLE
Attorneys for Appellants

October 15, 1968
657 Colman Bldg.
Seattle, Washington 98104

APPENDIX A

Washington State Advertising Control Act

CHAPTER 96

LAWS OF 1961

Section 1. The control of signs in areas adjacent to state highways of this state is hereby declared to be necessary to promote the public health, safety, welfare, convenience and enjoyment of public travel, to protect the public investment in the interstate system and other state highways, and to attract visitors to this state by conserving the natural beauty of areas adjacent to the interstate system, and of scenic areas adjacent to state highways upon which they travel in great numbers, and to insure that information in the specific interest of the traveling public is presented safely and effectively.

Sec. 2. When used in this act the term:

(1) "Commission" means the Washington State Highway Commission;

(2) "Erect" means to construct, build, raise, assemble, place, affix, attach, create, paint, draw, or in any other way bring into being or establish;

(3) "Interstate system" means any state highway which is or does become part of the national system of interstate and defense highways as described in section 103(d) of title 23, United States Code;

(4) "Maintain" means to allow to exist;

(5) "Person" means this state or any public or private corporation, firm, partnership, association, as well as any individual, or individuals;

(6) "Protected area" means all land adjoining or

adjacent to the interstate system and within six hundred sixty feet of the edge of the right of way;

(7) "Scenic area" means all land adjoining or adjacent to any state highway and within six hundred sixty feet of the edge of the right of way within any public park, federal forest area, public beach, or public recreation area, national monument and any state highway or portion thereof outside the boundaries presently existing on the effective date of this act of any incorporated city or town designated by the legislature as a scenic area;

(8) "Sign" means any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard or other thing which is designed, intended or used to advertise or inform any part of the advertising or informative contents of which is visible from any place on the main-traveled way of the interstate system or other state highway; and

(9) "State highway" means any primary or secondary state highway.

Sec. 3. Except as permitted under this act, no person shall erect or maintain a sign within a protected area or scenic area. In case of an area, which is both a protected area and a scenic area, only those signs permitted in a scenic area shall be erected or maintained.

Sec. 4. It is declared to be the policy of the state that only the following four types of signs shall be erected or maintained in a protected area:

(1) Directional or other official signs or notices that are required or authorized by law;

(2) Signs advertising the sale or lease of the property upon which they are located;

(3) Signs, not inconsistent with the policy of this act and the national policy set forth in section 131 of title 23, United States Code and the national standards promulgated thereunder by the secretary of commerce, advertising activities being conducted at a location within twelve miles of the point at which such signs are located; and

(4) Signs, not inconsistent with the policy of this act and the national policy set forth in section 131 of title 23, United States Code and the regulations promulgated thereunder by the secretary of commerce, designed to give information in the specific interest of the traveling public.

Only signs of type 1 and 2 and those type 3 signs which advertise activities conducted on the property where the signs are located shall be erected or maintained in a scenic area.

Sec. 5. Information signs may be erected and maintained by the state, any county, city, or town.

Sec. 6. The commission shall prescribe regulations for the erection and maintenance of signs permitted by this act within protected areas and scenic areas, and other regulations for the administration of this act consistent with the policy of this act and the national policy set forth in section 131, title 23, United States Code and the regulations promulgated thereunder by the secretary of commerce. Proceedings for review of any action taken by the commission pursuant to this act shall be instituted by filing a petition only in the Superior Court of Thurston county.

Sec. 7. Nothing in this act shall be construed to permit a person to erect or maintain any sign that is otherwise prohibited by statute or by the resolution or

ordinance of any county, city, or town of the state of Washington.

Sec. 8. (1) Any sign erected or maintained contrary to the provisions of this act or regulations promulgated hereunder shall be a public nuisance and the commission, the chief of the Washington state patrol, the county sheriff, or the chief of police of any city or town shall notify the permittee or, if there is no permittee, the owner of the property on which the sign is located, by registered mail, at his last known address, that it constitutes a public nuisance and must comply with the act or be removed.

(2) If the permittee or owner, as the case may be, shall fail to comply with the act or remove any such sign within fifteen days after being notified to remove such sign he shall be guilty of a misdemeanor. In addition to the penalties imposed by law upon conviction an order may be entered compelling removal of the sign. Each day such sign shall be maintained shall constitute a separate offense.

(3) If the permittee or the owner of the property upon which it is located, as the case may be, shall not be found or refuses receipt of the notice, the commission, the chief of the Washington state patrol, the county sheriff, or the chief of police of any city or town shall post the sign and property upon which it is located with a notice that the sign constitutes a public nuisance and must be removed. If the sign is not removed within fifteen days after such posting, the commission, the chief of the Washington state patrol, the county sheriff, or the chief of police of any city or town shall abate the nuisance and destroy the sign, and for that purpose may enter upon private property without incurring liability for so doing.

Sec. 9. If any person is convicted of a violation of

this act, or any regulation promulgated hereunder, the commission may revoke any permit issued to that person under this act.

Sec. 10. (1) No sign lawfully erected in a protected area prior to March 11, 1961, within a commercial or industrial zone within the boundaries of any city or town, as such boundaries existed on September 21, 1959, wherein the use of real property adjacent to the interstate system is subject to municipal regulation or control but which does not comply with the provisions of this chapter or any regulations promulgated hereunder, shall be maintained by any person after March 11, 1965.

(2) No sign, lawfully erected in a protected area prior to March 11, 1961, other than within a commercial or industrial zone within the boundaries of a city or town as such boundaries existed on September 21, 1959, wherein the use of real property adjacent to the interstate system is subject to municipal regulation or control but which does not comply with the provisions of this chapter or any regulations promulgated hereunder, shall be maintained by any person after three years from March 11, 1961.

(3) No sign lawfully erected in a scenic area prior to the effective date of the designation of such area as a scenic area shall be maintained by any person after three years from the effective date of the designation of any such area as a scenic area.

Sec. 11. The commission is authorized to enter into agreements (and such supplementary agreements as may be necessary) consistent with this act, with the secretary of commerce authorized under section 131(b) of title 23, United States Code, in order that the state may become eligible for increased federal aid as provided for in section 131 of title 23, United States Code.

Sec. 12. Notwithstanding any other provisions of this act, no sign except a sign of type 1 or 2 or those type 3 signs which advertise activities conducted upon the properties where such signs are located, shall be erected or maintained without a permit issued by the commission. Application for permit shall be made to the commission on forms furnished by it, which forms shall contain a statement that the owner or occupant of the land in question has consented thereto and shall be accompanied by a fee to be deposited with the state treasurer to the credit of the motor vehicle fund in accordance with the following schedule: (1) Fifty cents per sign if advertising area does not exceed fifty square feet; (2) Two dollars per sign if advertising area exceeds fifty square feet. Permits shall be for the calendar year and shall be renewed annually upon payment of said fee for the new year without the filing of a new application. Fees shall not be prorated for fractions of the year. Advertising copy may be changed at any time without the payment of additional fee. Assignment of permits in good standing shall be effective only upon receipt of written notice of assignment by the highway commission. A permit may be revoked after hearing if the commission finds that any statement made in the application therefore was false or misleading, or that the sign covered thereby is not in good general condition and in a reasonable state of repair, or is otherwise in violation of this act, provided that such false or misleading information has not been corrected and that the sign has not been brought into compliance with this act within thirty days after written notification thereof.

Sec. 13. Every permit issued by the commission shall be assigned a separate identification number, and it shall be the duty of each permittee to fasten to each sign a weatherproof label, not larger than six square inches, which shall be furnished by the commission

and on which shall be plainly visible the said permit number. The permittee shall also place his name in a conspicuous position on the front or back of each sign. The failure of a sign to have affixed thereto such a label shall be prima facie evidence that the same is not in compliance with the provisions of this act.

Sec. 14. The following portions of state highways are designated scenic areas: (1) Primary state highway No. 1, or the Pacific highway, beginning at the limits of Larrabee state park (north line of section 36, township 37 north, range 2 east), thence in a southerly direction to the Blanchard overcrossing (Bridge No. $\frac{1CD}{104}$).

(2) Primary state highway No. 2, or the Sunset highway, beginning at the westerly intersection of secondary state highway No. 2D (interchange $\frac{2}{626}$), thence in an eastern direction by way of North Bend, Snoqualmie pass, Cle Elum, Blewitt pass to a junction with primary state highway No. 15 in the vicinity of Peshastin.

(3) Primary state highway No. 15, the Stevens pass highway, beginning at Woods creek bridge (bridge $\frac{15}{216}$) at the east city limits of Monroe, thence in an easterly direction by way of Stevens pass to a junction with primary state highway No. 2 in the vicinity of Peshastin.

(4) Primary state highway No. 5, the National park highway, beginning at the Scatter creek bridge (bridge $\frac{5}{303}$) approximately six miles east of Enumclaw, and proceeding by way of Chinook pass to the west city limits of the town of Naches. Also beginning at

the junction of secondary state highway No. 5E east of the town of South Prairie, thence in a southerly direction to the northwest entrance to Mount Rainier national park; also beginning at a junction with secondary state highway No. 5H south of Spanaway, thence in a southerly direction by way of Elbe, thence in an easterly direction to the southwest entrance to Mount Rainier national park; also beginning at a junction with primary state highway No. 5 at Cayuse junction in the vicinity west of Chinook pass, thence in a southerly direction to a junction with primary state highway No. 5 at the Ohanapecosh junction in the vicinity west of White pass; and also beginning at a junction with primary state highway No. 5 at Kosmos, thence in an easterly direction across White pass to the Oak Flat junction with primary state highway No. 5 northwest of Yakima.

Sec. 15. The joint fact finding committee on highways, streets and bridges is authorized and directed to study the application of the federal standards to the regulation of outdoor advertising upon the interstate highways within the state of Washington and criteria for the establishment of additional scenic areas upon any state highway upon which outdoor advertising shall be regulated, and report to the 1963 legislature thereon.

Sec. 16. If any provision of this act or its application to any person or circumstances is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

Sec. 17. This act shall be known and may be cited as the Highway Advertising Control Act of 1961.

Sec. 18. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

APPENDIX B

STATE HIGHWAY COMMISSION RULES AND REGULATIONS

Highway Advertising Control Act of 1961

I. Definitions

The following terms when used in these regulations shall have the following meanings:

A. "Act" as used herein shall mean the Highway Advertising Control Act of 1961.

B. "Centerline of the highway" means a line equidistant from the edges of the median separating the main-traveled ways of a divided interstate highway, or the centerline of the main-traveled way of a nondivided interstate highway.

C. "Commission" means the Washington State Highway Commission.

D. "Entrance roadway" means any public road or turning roadway, including acceleration lanes, by which traffic may enter the main-traveled way of an interstate highway from the general road system within a state, irrespective of whether traffic may also leave the main-traveled way by such road or turning roadway.

E. "Exit roadway" means any public road or turning roadway including deceleration lanes, by which traffic may leave the main-traveled way of an interstate highway to reach the general road system within a state, irrespective of whether traffic may also enter the main-traveled way by such road or turning roadway.

B 3

F. "Information sign" shall mean any signs, otherwise conforming to the act and these regulations as a Class 4 sign as defined in Section IV, D, erected and maintained by the state or any agency thereof or any county or incorporated city or town giving directions or information concerning scenic attrations, historical sites, recreational areas and opportunities, or unique or unusual characteristics of the area to which the information relates.

G. "Interstate system" for purposes of administering the act, shall mean appropriately designated state highways or portions thereof on definite and detailed locations and shall include as of the date of the adoption of the regulations the following:

1. From the effective date of this act, the following state highways and sections thereof shall be deemed a part of the interstate system as now located:

   (Description of designated interstate routes omitted)

2. After the effective date of the act a section of state highway shall become a part of the interstate system for purposes of this act when established as such by the Washington state highway commission pursuant to R.C.W. 47.52 (limited access facilities).

H. "Legible" means capable of being read without visual aid by a person of normal visual acuity.

I. "Maintain" means to allow to exist.

J. "Main-traveled way" means the traveled way of an interstate highway on which through traffic is carried. In the case of a divided highway, the traveled way of each of the separated roadways for traffic in opposite directions is a main-traveled

way. It does not include such facilities as frontage roads, turning roadways, or parking areas.

K. "Person" means this state or any public or private corporation, firm, partnership, association, as well as any individual, or individuals.

L. "Protected area" means all land adjoining or adjacent to the interstate system and within six hundred sixty feet of the edge of the right of way.

M. "Scenic area" means all land adjoining or adjacent to any state highway and within six hundred sixty feet of the edge of the right of way within any public park, federal forest area, public beach, or public recreation area, national monument and any state highway or portion thereof outside the boundaries presently existing on March 11, 1961 of any incorporated city or town designated by the legislature as a scenic area.

N. "Sign" means any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or other thing which is designed, intended, or used to advertise or inform, any part of the advertising or informative contents of which is visible from any place on the main-traveled way of the interstate system or other state highway.

O. "State highway" means any primary or secondary state highway.

P. "Trade name" shall include brand name, trademark, distinctive symbol, or other similar device or thing used to identify particular products or services.

Q. "Traveled way" means the portion of a roadway for the movement of vehicles, exclusive of shoulders.

R. "Turning roadway" means a connecting roadway for traffic turning between two intersection legs of an interchange.

S. "Visible" means capable of being seen (whether or not legible) without visual aid by a person of normal visual acuity.

II. General Provisions

Erection or maintenance of signs having any of the following characteristics is prohibited in protected or scenic areas notwithstanding any other provision of the act and these regulations.

A. Signs advertising activities that are illegal under state or federal laws or regulations in effect at the location of such signs or at the location of such activities.

B. Obsolete signs.

C. Signs that are not clean and in good repair.

D. Signs that are not securely affixed to a substantial structure.

E. Signs which attempt or appear to attempt to direct the movement of traffic or which interfere with, imitate or resemble any official traffic sign, signal or device.

F. Signs which prevent the driver of a vehicle from having a clear and unobstructed view of official signs and approaching or merging traffic.

G. Signs which contain, include, or are illuminated by any flashing, intermittent or moving light or lights.

H. Signs which use any lighting in any way unless it is so effectively shielded as to prevent beams or rays of light from being directed at any portion of the main-traveled way of the interstate system or is of such low intensity or brilliance as not to cause glare or to impair the vision of the driver of any motor vehicle, or to otherwise interfere with any driver's operation of a motor vehicle.

I. Signs which move or have any animated or moving parts.

J. Signs which are erected or maintained upon trees or painted or drawn upon rocks or other natural features.

K. Signs which exceed twenty feet in length, width or height, or one hundred fifty square feet in area, including border and trim but excluding supports, except Class 3 signs not more than fifty feet from, and advertising activities being conducted upon the real property where the sign is located.

III. Measurements of Distance

A. Distance from the edge of a right of way shall be measured horizontally along a line normal or perpendicular to the centerline of the highway.

B. All distances for measurement of location of signs permitted under Sections IV and V and spacing requirements of Section VII shall be measured along the centerline of the highway between two vertical planes which are normal or perpendicular to and intersect the centerline of the highway and which pass through the termini of the measured distance.

IV. Signs That May Be Permitted in Protected Areas

Only the following signs may be erected or maintained in protected areas:

A. Class 1—Official signs: Directional or other official signs or notices erected and maintained by public officers or agencies pursuant to and in accordance with direction or authorization contained in state or federal law, for the purpose of carrying out an official duty or responsibility.

B. Class 2—For sale or lease of signs. Signs not prohibited by state law which are consistent with the applicable provisions of these regulations and which advertise the sale or lease of, the real property where the signs are located.

Not more than one such for sale or lease of sign may be permitted in such manner as to be visible to traffic proceeding in any one direction on any one interstate highway.

C. Class 3—Signs within twelve air miles of advertised activities. Signs not prohibited by state law which are consistent with the applicable provisions of these regulations and which advertise activities conducted within twelve air miles of such signs.

Not more than one sign, advertising activities being conducted upon real property where the sign is located, visible to traffic proceeding in any one direction on any one interstate highway, may be permitted more than fifty feet from the advertised activities.

D. Class 4—Signs in the specific interest of the traveling public. Signs authorized to be erected or maintained by state law which are consistent with these regulations and which are designed to give information in the specific interest of the traveling public.

V. Signs Permitted in Scenic Areas

Only signs of Class 1 and 2 and those Class 3 signs which advertise activities conducted on the property where the signs are located shall be erected or maintained in a scenic area.

Not more than one sign visible to traffic proceeding in any one direction and advertising activities being conducted upon the real property where the sign is located, may be permitted more than fifty feet from the advertised activity,

VI. Informational Sites

Informational sites, meaning an area or site established and maintained within or adjacent to the right of way of a highway on the interstate system by or under the supervision or control of a state highway department wherein are panels for the display of advertising and informational signs are prohibited.

VII. Number of Signs and Spacing Requirements

The erection or maintenance of Class 3 (except those Class 3 signs which advertise activities conducted on the property where the signs are located) and Class 4 signs within protected areas may not be permitted in any manner inconsistent with the following:

A. In protected areas in advance of an intersection of the main-traveled way of an interstate highway and an exit roadway, such signs visible to interstate highway traffic approaching such intersection may not be permitted to exceed the following number:

Distance from Intersection	Number of Signs
0-2 miles	0
2-5 miles	6
More than 5 miles .....Average of one sign per mile	

The specified distances shall be measured to the nearest point of the intersection of the traveled way of the exit roadway and the main-traveled way of the interstate highway.

B. Subject to the other provisions of this Section, not more than two such signs may be permitted within any mile distance measured from any point, and no such signs may be permitted to be less than 1,000 feet apart.

C. Such signs may not be permitted in protected areas adjacent to any interstate highway right of way upon any part of the width of which is constructed an entrance or exit roadway.

D. Such signs visible to interstate highway traffic which is approaching or has passed an entrance roadway may not be permitted in protected areas for 1,000 feet beyond the furthest point of the intersection between the traveled way of such entrance roadway and the main-traveled way of the interstate highway.

E. Not more than one such sign advertising activities being conducted as a single enterprise or giving information about a single place may be permitted to be erected or maintained in such manner as to be visible to traffic moving in any one direction on any one interstate highway except within fifty feet and on the premises of the activity advertised.

VIII. Preference of Applicants for Class 3 and Class 4 Sites

Applications for available Class 3 and Class 4 sign sites, where the number of applications shall exceed the available sites, shall be awarded upon the following preferential basis:

A. Agencies of the State of Washington in order of their applications.

B. Counties or incorporated cities in the order of their applications.

C. Federal agencies in the order of their applications.

D. All other applicants in the order of their applications, giving preference, however, to the holder of an existing permit for renewal thereof. All applications received during the Commision's normal office hours during the same day shall be construed as having been received simultaneously. In the case of a tie between applicants, and upon notification thereof by the Commission, the Commission shall determine by lot which shall receive the permit.

IX. Advertising Copy

A. A Class 3 sign, except a sign not more than fifty feet from the advertised activity, that displays any trade name which refers to or identifies any service rendered or product sold, used or otherwise handled more than twelve air miles from such sign may not be permitted unless the name of the advertised activity which is within twelve air miles of such sign is displayed as conspicuously as such trade name.

B. In Class 4 signs, only information about public

places operated by Federal, state or local governments, natural phenomena, historic sites, areas of natural scenic beauty or naturally suited for outdoor recreation, and places for camping, lodging; eating and vehicle service and repair is deemed to be in the specific interest of the traveled public. For the purposes of the act and these regulations, a trade name is deemed to be information in the specific interest of the traveling public only if it identifies or characterizes such a place or identifies vehicle service, equipment, parts, accessories, fuels, oils or lubricants being offered for sale at such a place. Signs displaying any other trade name may not be permitted under Class 4.

C. Notwithstanding the provisions of paragraph A of this section, Class 3 signs which also qualify as Class 4 signs may display trade names in accordance with the provision of paragraph B of this section.

X. Permits

A. No signs except a Class 1 or Class 2 or those Class 3 signs advertising activities conducted upon the properties where such signs are located shall be erected or maintained without a permit issued by the commission. Permits for erection of other Class 3 and of all Class 4 signs will be issued by the Highway commission in accordance with these rules and regulations.

B. No applications for permits will be received prior to July 1, 1961; however, thereafter applications will be accepted only at the Department of Highways Headquarters Office, Olympia, Washington. Applications transmitted by mail shall be effective from date of receipt rather than of mailing.

C. Application forms shall contain:

1. The name and address of the person who will erect and/or maintain the sign;

2. A statement and the signature of the owner or occupant of the land on which the sign is to be erected or maintained indicating that he has consented thereto;

3. A statement of the precise location where the sign is to be erected or maintained;

4. A statement of the proposed size, shape and copy of the sign; and

5. Such other information as may be required by the Commission.

D. Applications shall be accompanied by a fee in accordance with the following schedule:

1. Fifty cents per sign if advertising area does not exceed fifty square feet.

2. Two dollars per sign if advertising area exceeds fifty square feet.

E. Permits shall be for the calendar year and shall be renewed annually upon payment of said fee for the new year without the filing of a new application except as provided in Section VIII. Fees shall not be prorated for fractions of the year.

F. Changes in size, shape, position or copy of a permitted sign or replacement with a new sign shall be reported to the Commission at Olympia at least ten days before a change is to be made. Such changes will not require a new permit except where change in size of sign places sign in the higher permit fee bracket.

G. Assignment of permits in good standing shall be effective only upon receipt of assignment by the Highway Commission.

H. Every permit issued by the Commission shall be assigned a separate identification number, and it shall be the duty of each permittee to fasten to each sign a weatherproof label, not larger than six square inches, which shall be furnished by the Commission and on which shall be plainly visible the said permit number. The permittee shall also place his name in a conspicuous position on the front or back of each sign.

I. A permit issued under these rules does not relieve the permittee from the duty to comply with all local rules, regulations, and ordinances pertaining to signs and sign structures.

XI. Penalties

After hearing, as required by R.C.W. 34.04 (administrative procedures act) and the rules and regulations of the Commission adopted pursuant thereto, any permit may be revoked by the Commission for any of the following reasons:

A. For the making of any false or misleading statements in the application for any permit, whether or not the same is material to or relied upon by the Commission in the issuance of such permit when such false or misleading statement or information shall remain uncorrected after the expiration of thirty days following written notification thereof.

B. For allowing or suffering any sign to remain in a condition of disrepair or unreasonable state of repair after the expiration of thirty days following written notification thereof.

C. For maintaining any sign, for which a permit has been issued, in violation of any provision of the act or these regulations after the expiration of thirty days following written notification thereof.

D. For any convictions of a violation of the act or any of these regulations, any permit held by the convicted person may be revoked whether or not such violation is related to the sign for which the permit is revoked.

Notice whenever required herein shall be given to the person entitled thereto by registered mail at the last known address of such person which shall be such address as may be on file with the Commission, if any, otherwise the last address of such person shown by the tax records of the county in which the real property upon which the sign in question is maintained.

Computation of time when dependent upon giving of notice shall relate to the day of mailing such notice rather than the day of receipt.

APPENDIX C

Federal Highway Beautification Act, 1965

(79 Stat. 1028-30, 1033)

(89th Congress, 1st. session, 1965)

TITLE I

Sec. 101. Section 131 of title 23, United States Code, is revised to read as follows:

"§ 131. Control of outdoor advertising

"(a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty.

"(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State.

"(c) Effective control means that after January 1, 1968, such signs, displays, and devices shall, pursuant to this section, be limited to (1) directional and other official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning the lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, and (3) signs, displays, and devices advertising activities conducted on the property on which they are located.

"(d) In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. Nothing in this subsection shall apply to signs, displays, and devices referred to in clauses (2) and (3) of subsection (c) of this section.

"(e) Any sign, display, or device lawfully in existence along the Interstate System or the Federal-aid primary system on September 1, 1965, which does not conform to this section shall not be required to be removed until July 1, 1970. Any other sign, display, or device lawfully erected which does not conform to this section shall not be required to be removed until the end of the fifth year after it becomes nonconforming.

"(f) The Secretary shall, in consultation with the States, provide within the rights-of-way for areas at appropriate distances from interchanges on the Interstate System, on which signs, displays, and devices giving specific information in the interest of the traveling public may be erected and maintained. Such signs shall conform to national standards to be promulgated by the Secretary.

"(g) Just compensation shall be paid upon the removal of the following outdoor advertising signs, displays, and devices—

"(1) those lawfully in existence on the date of enactment of this subsection,

"(2) those lawfully on any highway made a part of the interstate or primary system on or after the date of enactment of this subsection and before January 1, 1968, and

"(3) those lawfully erected on or after January 1, 1968.

The Federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

"(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

"(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon.

"(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary.

"(i) In order to provide information in the specific interest of the traveling public, the State highway departments are authorized to maintain maps and to permit informational directories and advertising pamphlets to be made available at safety rest areas. Subject to the approval of the Secretary, a State may also establish information centers at safety rest areas for the purpose of informing the public of places of interest within the State and providing such other information as a State may consider desirable.

"(j) Any State highway department which has, under this section as in effect on June 30, 1965, entered into an agreement with the Secretary to control the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System shall be entitled to receive the bonus payments as set forth in the agreement, but no such State highway department shall be entitled to such payments unless the State maintains the control required under such agreement or the control required by this section, whichever control is stricter. Such payments shall be paid only from appropriations made to carry out this section. The provisions of this subsection shall not be construed to exempt any State from controlling outdoor advertising as otherwise provided in this section.

"(k) Nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section.

"(l) Not less than sixty days before making a final determination to withhold funds from a State under subsection (b) of this section, or to do so under subsection (b) of section 136, or with respect to failing to agree as to the size, lighting, and spacing of signs, displays, and devices or as to unzoned commercial or industrial areas in which signs, displays, and devices may be erected and maintained under subsection (d) of this section, or with respect to failure to approve under subsection (g) of section 136, the Secretary shall give written notice to the State of his proposed determination and a statement of the reasons therefor, and during such period shall give the State an opportunity for a hearing on such determination. Following such hearing the Secretary shall issue a written order setting forth his final determination and shall furnish a copy of such order to the State. Within forty-five days of receipt of such order, the State may appeal such order to any United States district court for such State, and upon the filing of such appeal such order shall be stayed until final judgment has been entered on such appeal. Summons may be served at any place in the United States. The court shall have jurisdiction to affirm the determination of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the United States court of appeals for the circuit in which the State is located and to the Supreme Court of the United States upon certiorari or certification as provided in title 28, United States Code, section 1254. If any part of an apportionment to a State is withheld by the Secretary under subsection (b) of this section or subsection (b) of section 136, the amount so with-

held shall not be reapportioned to the other States as long as a suit brought by such State under this subsection is pending. Such amount shall remain available for apportionment in accordance with the final judgment and this subsection. Funds withheld from apportionment and subsequently apportioned or reapportioned under this section shall be available for expenditure for three full fiscal years after the date of such apportionment or reapportionment as the case may be.

"(m) There is authorized to be appropriated to carry out the provisions of this section, out of any money in the Treasury not otherwise appropriated, not to exceed $20,000,000 for the fiscal year ending June 30, 1966, and not to exceed $20,000,000 for the fiscal year ending June 30, 1967. No part of the Highway Trust Fund shall be available to carry out this section."

Sec. 102. The table of sections of chapter 1 of title 23 of the United States Code is amended by striking out

"131. Areas adjacent to the Interstate System."

and inserting in lieu thereof

"131. Control of outdoor advertising."

TITLE II

(provisions relating to junkyards omitted)

TITLE III

Sec. 301. (a) Section 319 of title 23, United States Code, is revised to read as follows:

"§ 319. Landscaping and scenic enhancement

"(a) The Secretary may approve as a part of the construction of Federal-aid highways the cost of landscape and roadside development, including acquisition and development of publicly owned and controlled rest and recreation areas and sanitary and other facilities reasonably necessary to accommodate the traveling public.

"(b) An amount equivalent to 3 per centum of the funds apportioned to a State for Federal-aid highways for any fiscal year shall be allocated to that State out of funds appropriated under authority of this subsection, which shall be used for landscape and roadside development within the highway right-of-way and for acquisition of interests in and improvement of strips of land necessary for the restoration, preservation, and enhancement of scenic beauty adjacent to such highways, including acquisition and development of publicly owned and controlled rest and recreation areas and sanitary and other facilities within or adjacent to the highway right-of-way reasonably necessary to accommodate the traveling public, without being matched by the State. The Secretary may authorize exceptions from this requirement, upon application of a State and upon a showing that such amount is in excess of the needs of the State for these purposes. Any funds not used as required by this subsection shall lapse. There is authorized to be appropriated to carry out this subsection, out of any money in the Treasury not otherwise appropriated, not to exceed $120,000,000 for the fiscal year ending June 30, 1966, and not to exceed $120,000,000 for the fiscal year ending June 30, 1967. No part of the Highway Trust Fund shall be available to carry out this subsection."

(b) The table of sections of chapter 3 of title 23 of the United States Code is amended by striking out

"319. Landscaping."

and inserting in lieu thereof

"319. Landscaping and scenic enhancement."

Sec. 302. In order to provide the basis for evaluating the continuing programs authorized by this Act, and to furnish the Congress with the information necessary for authorization of appropriations for fiscal years beginning after June 30, 1967, the Secretary, in cooperation with the State highway department, shall make a detailed estimate of the cost of carrying out the provisions of this Act, and a comprehensive study of the economic impact of such programs on affected individuals and commercial and industrial enterprises, the effectiveness of such programs and the public and private benefits realized thereby, and alternate or improved methods of accomplishing the objectives of this Act. The Secretary shall submit such detailed estimate and a report concerning such comprehensive study to the Congress not later than January 10, 1967.

Sec. 303. (a) Before the promulgation of standards, criteria, and rules and regulations, necessary to carry out sections 131 and 136 of title 23 of the United States Code, the Secretary of Commerce shall hold public hearings in each State for the purpose of gathering all relevant information on which to base such standards, criteria, and rules and regulations.

(b) The Secretary of Commerce shall report to Congress, not later than January 10, 1967, all standards, criteria, and rules and regulations to be applied in carrying out sections 131 and 136 of title 23 of the United States Code.

Sec. 304. There is authorized to be appropriated the sum of $500,000 to enable the Secretary of Commerce to carry out his functions under section 135 of title 23 of the United States Code relating to highway safety programs.

Sec. 305. Nothing in this Act or the amendments made by this Act shall be construed to authorize the use of eminent domain to acquire any dwelling (including related buildings).

TITLE IV

Sec. 401. Nothing in this Act or the amendments made by this Act shall be construed to authorize private property to be taken or the reasonable and existing use restricted by such taking without just compensation as provided in this Act.

Sec. 402. In addition to any other amounts authorized by this Act and the amendments made by this Act, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, to the Secretary of Commerce not to exceed $5,000,000 for administrative expenses in carrying out this Act (including amendments made by this Act).

Sec. 403. This Act may be cited as the "Highway Beautification Act of 1965."

APPENDIX D

Federal Highway Beautification Act, 1968

Section 6 of the Federal Aid-Highway Act of 1968 provides as follows:

"Sec. 6 (a) Section 131 (d) of title 23, United States Code, is amended by inserting the following sentence between the second and third sentences of the subsection: "Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority."

(b) The first sentence of section 131 (j) of title 23, United States Code, is amended by striking out "or the control required by this section, whichever control is stricter".

(c) Section 131(m) of title 23, United States Code, is amended to read as follows:

"(m) There is authorized to be appropriated to carry out the provisions of this section, out of any money in the Treasury not otherwise appropriated, not to exceed $20,000,000 for the fiscal year ending June 30, 1966, not to exceed $20,000,000 for the fiscal year ending June 30, 1967, and not to exceed $2,000,000 for the fiscal year ending June 30, 1970. The provisions of this chapter relating to the obligation, period of availability and expenditure of Federal-aid primary highway funds shall apply to the funds authorized to be appropriated to carry out this section after June 30, 1967."

(d) Section 131 of title 23, United States Code, is amended by adding at the end thereof the fol-

lowing new subsection:

"(n) No sign, display, or device shall be required to be removed under this section if the Federal share of the just compensation to be paid upon removal of such sign, display, or device is not available to make such payment."

(e) Section 136(m) of title 23, United States Code, is amended to read as follows:

"(m) There is authorized to be appropriated to carry out this section, out of any money in the Treasury not otherwise appropriated, not to exceed $20,000,000 for the fiscal year ending June 30, 1966, not to exceed $20,000,000 for the fiscal year ending June 30, 1967, and not to exceed $3,000,000 for the fiscal year ending June 30, 1970. The provisions of chapter 1 of this title relating to the obligation, period of availability, and expenditure of Federal-aid primary highway funds shall apply to the funds authorized to be appropriated to carry out this section after June 30, 1967."

(f) Section 319(b) of title 23, United States Code, is amended by striking out the last two sentences and inserting in lieu thereof the following: "There is authorized to be appropriated to carry out this subsection, out of any money in the Treasury not otherwise appropriated, not to exceed $120,000,000 for the fiscal year ending June 30, 1966, not to exceed $120,000,000 for the fiscal year ending June 30, 1967, and not to exceed $20,000,000 for the fiscal year ending June 30, 1970. The provisions of chapter 1 of this title relating to the obligation, period of availability, and expenditure of Federal-aid primary highway funds shall apply to the funds authorized to be appropriated to carry out this subsection after June 30, 1967."

(g) There is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, for necessary administrative expenses in carrying out sections 131, 136, and 319(b) of title 23, United States Code, not to exceed $1,250,000 for the fiscal year ending June 30, 1969, and $1,250,000 for the fiscal year ending June 30, 1970."

APPENDIX E

Memorandum Opinion of the Superior Court of the State of Washington for the County of Thurston of August 18, 1966

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

No. 35570 — Memorandum Opinion

MARKHAM ADVERTISING COMPANY, INC.; CASEY & STONE COMPANY; COLUMBIA BASIN OUTDOOR ADVERTISING CO.; FOSTER AND KLEISER, DIVISION OF METROMEDIA, INC.; NORTHWEST OUTDOOR ADVERTISING CORPORATION; NATIONAL ADVERTISING CO.; OBIE OUTDOOR ADVERTISING COMPANY; YAKIMA VALLEY POSTER SERVICE, INC., individually and as a Class,
Plaintiffs,

vs.

THE STATE OF WASHINGTON; WASHINGTON STATE HIGHWAY COMMISION AND THE HONORABLE MEMBERS THEREOF, CONSISTING OF ERNEST A. COWELL, CHAIRMAN; ROBERT L. MIKALSON, GEORGE D. ZAHN, JAMES M. BLAIR, SR. AND IRVING CLARK, JR., their Officers, Agents and Employees,
Defendants.

IRA R. GRANT, *Intervenor.*

M. C. BEATIE AND TRANQUILLA KOZAK,
Additional Intervenors.

This matter came on for trial commencing on the 22nd day of March, 1966 and continued for a total of fifteen days. This matter was brought by the plaintiffs as a class action attacking the constitutionality of Chapter 96, Laws of 1961 of the State of Washington. The plaintiffs were represented by their attorneys Al-

fred J. Schweppe of the firm Schweppe, Reiter, Doolittle & Krug, C. Lee Coulter of the firm Coulter & Lee, W. R. Studley of the firm Studley & Purcell, and Thomas L. Morrow of the firm Bogle, Gates, Dobrin, Wakefield & Long. The defendants were represented by John J. O'Connell, Attorney General, by Delbert W. Johnson, Roger A. Gerdes and C. E. Watts, all Assistant Attorneys General of the State of Washington. Joined as amicus curiae was George M. Mack of the firm Roberts, Shefelman, Lawrence, Gay & Moch on behalf of the following organizations: Washington Roadside Council, Inc.; Allied Arts of Seattle, Incorporated; Federated East Side Clubs of King County, Washington; Federation of Western Outdoor Clubs; Pacific Northwest Chapter, American Institute of Planners; The Seattle Garden Club; The State Association of the Daughters of the Pioneers of Washington; Vancouver Arts; Washington State Council of Architects, A.I.A., Inc.; Washington State Federation of Garden Clubs; and Washington State Federation of Women's Clubs. Mr. Thomas K. Cassidy of the firm Bassett, Donaldson & Hafer appeared as amicus curiae on behalf of the Sign Painters Local Union No. 435, District Council of Carpenters of Seattle & Vicinity, Sign & Pictorial Painters Local No. 403, Tacoma, Washington Hod Carriers and General Laborers Union No. 242 and International Alliance of Bill Posters and Billers No. 49. Also appearing as amicus curiae were the Western Outdoor Markets, a California corporation through its attorney Anthony J. Quigley of San Francisco. Intervenors in the action were Ira R. Grant who was represented by his counsel Barrett White and M. C. Beatie and Tranquilla Kozak represented by their attorney Mr. W. R. Studley.

In preface to this memorandum opinion, the court will state that as a daily transcript of the testimony was had on this case, the court has had an opportunity to review all of the evidence, examine all the exhibits,

and read all the briefs of the various parties hereto. A number of legal questions were raised in this case by the plaintiffs and a number of voluminous briefs were filed. The court does not intend in this opinion to discuss all of the points raised or all the arguments either for or against, but will render its opinion on those points which the court feels have merit, which are numerous.

As to the evidence in the case, after the trial had proceeded at some length, a stipulation was entered into by the plaintiffs and the defendants covering and establishing a number of facts for the court's consideration and much of the balance of the evidence given in court related to the affect of the signs of the plaintiffs on traffic safety reflecting on the question of whether the Highway Advertising Control Act of 1961, being Chapter 96, Laws of 1961 of the State of Washington, is an unconstitutional exercise of the police power of the state.

The court will first discuss the question of the exercise of the police power in reference to Chapter 96 of the Laws of 1961. Our Supreme Court has through a number of decisions layed out the guide lines in determining the constitutionality of any acts passed by the legislature. It must first be born in mind that there is a presumption of the constitutionality of any legislative enactment unless its repugnancy to the constitution clearly appears or is made to appear beyond a reasonable doubt. See *Port of Tacoma v. Parosa,* 52 Wn.2d 181. Further where there is a legislative finding of public nuisance as in this case or declaration of public policy as exists in Chapter 96, Laws of 1961, the court cannot dispute this legislative finding or declaration of policy, see *Frach v. Schoettler,* 46 Wn.2d 281, unless no state of circumstances could exist to justify such a statute, and in that case the court may declare the statute void because an

excess of the legislative power of the state. See *State ex rel, Stimson Lumber Co. v. Kuykendall,* 137 Wn.2d 602.

The normal rule is to the effect that the police power may only be used where the public health, safety, morals, or welfare are involved. The plaintiffs argue that in this case the only possible use of the police power would fall under and relate to safety, being herein traffic safety, or the welfare of the public. With this the court agrees. There can be no argument that traffic safety is a valid subject for the exercise of the police power of the state. As to the guide lines which the court must follow in determining whether this is a valid exercise of the police power, one of the best expressions of the limitations on the court is found in *McDermott v. State,* 197 Wash. 79, 84 P.2d 372 at 83-84 where the court states as follows:

> "In the exercise of police power, the legislature is vested with a wide discretion not only to determine what the public interest requires, but also to adopt measures necessary for such protection. The wisdom, necessity, and expediency of a statute are questions within the province of the legislature alone, and if the legislature proceeds regularly and violates no constitutional restriction, and a state of facts can reasonably be presumed to exist which would justify the legislation, the court will presume that it did exist, and that the law was enacted for that reason. If, however, no such state of facts could exist to justify the statute, then it may be declared void because it transcends the constitutional limits of the legislative power. *Continental Baking Co. v. Mount Vernon,* 182 Wash. 68, 44 P.2d 821; *Shea v. Olson,* 185 Wash. 143, 53 P.2d 615, 111 A.L.R. 998, and cases cited."

Under this test the court must then examine first as to whether there are any state of facts which could exist to justify the exercise of the police power as to public safety under Chapter 96, Laws of 1961, and specifically whether the removal or control of billboards from interstate highways in the state of Washington will promote public safety and specifically as argued by plaintiffs whether billboards along interstate highways contribute to traffic accidents.

As previously stated, a great deal of the trial was devoted to testimony concerning the affect of billboards on traffic safety and highway accidents. The court heard the testimony of Dr. Ernest Blanche, a noted specialist in the mathematical, statistical research field and data processing field from Kensington, Maryland, who stopped research and made a comprehensive study using statistical methods as to the relationship between billboards and traffic accidents. Basically, his conclusions were that there was no significant relationship between highway accidents and highway billboards. The plaintiff also called Dr. Reuel Alvin Sherman, a doctor of optical science, who testified at length as to the function of the eyes especially as to driving of motor vehicles. His opinion was to the effect that billboards do not affect traffic safety and actually are an aid to drivers in that a driver should move his eyes at all times while driving. The basic conclusion the court arrived at from his testimony was to the effect that billboards in themselves did not contribute to traffic accidents.

The defendants called as their witness Dr. Zygmunt Birnbaum, a professor of mathematics at the University of Washington and the head of the statistics laboratory thereof. This witness was called by the defense to discredit the statistical methods used by Dr. Blanche in arriving at his conclusions in his studies as to the relationship between billboards and traffic

accidents. The state also called Dr. Harold Richard Blackwell, a professor of physics, physiological optics, and ophthalmology and director of the institute of research in vision in Ohio State University at Columbus, Ohio. He testified concerning vision in relation to driving and the affect of reading of billboards by a driver of a motor vehicle while operating his motor vehicle. On its behalf the defendants further called William Robert Curry, an employee of the Washington State Highway Department and assistant traffic engineer, having a degree in civil engineering from the Oregon University. His basic testimony was as to stopping distances at various speeds to be used with certain testimony of Dr. Blackwell as to the length of time it would take a driver to read certain standard billboards.

As to these witnesses, after listening to testimony from both the plaintiff's witnesses and defense witnesses, it would appear that there is an unreconcilable conflict as to opinions as to the affect of billboards on traffic accidents and safety. The plaintiffs rely heavily upon the testimony of Dr. Blanche and maintain that his studies and the conclusions reached are conclusive as to the affect of billboards upon traffic accidents. The defendant, through the testimony of Dr. Blackwell and William Curry, refute the contention of the plaintiffs in that Dr. Blackwell's testimony from test runs under simulated conditions, were to the effect that to read one of the standard billboards and to comprehend the message thereon would cause the driver to divert his eyes from the highway, at least as to peripheral vision, for a period of from four to six seconds and coupled with the testimony of William Curry as to the distance traveled at 70 miles per hour during the period of four to six seconds would lead to the conclusion that the inattention of this driver during that period of time could by inattention give rise to the possibility of being involved in an auto-

mobile accident. It is the opinion of the court from the testimony and from the evidence that sufficient facts have been proved to justify the legislation as to police power. While there certainly may be a dispute, this in itself is not controlling as stated in *New York State Thruway Authority v. Ashley Motor Court,* 10 N.Y.2d 158, 176 N.E.2d 566 (1961) in which it was held:

> "There are some perhaps, who may dispute whether billboards or other advertising devices interfer with safe driving and constitute a traffic hazard, but mere disagreement may not cast doubt on the state's statutes validity. Matters such as these are reserved for legislative judgment, and the legislative determination, here expressly announced, will not be disturbed unless manifestly unreasonable."

It is not the province of the court in a case such as this to substitute its judgment for that of the legislature as this would be an interference by the court with the legislative process. And whether the court believes that billboards contribute to traffic accidents or not is of no consequence unless the court is satisfied that there are no facts which exist to justify the statute, which instance the court must declare legislation void and the court cannot say that the legislature acted arbitrarily and capriciously in enacting Chapter 96 of the Laws of 1961.

This very question has been considered by courts in various states of the union in which the same arguments were posed as to a valid exercise of the police power and in which a similar billboard control law was upheld. See *General Outdoor Advertising Co. v. Dept. of Public Works,* (Mass., 1935) 193 N. E. 799; *Kelbro, Inc. v. Myrick,* (Vt., 1943) 30 A. 2d 527; *New York State Thruway Authority v. Ashley Motor Court, Inc.,* supra; *Moore v. Ward,* 377 S. W. 2d 881,

(Ky., 1964).

The next question to be considered by the court, raised by the plaintiff, is the alleged conflict between the state statute and the Federal Highway Beautification Act of 1965, being Public Law 89285, 23 U.S.C.A. Sec. 131 amended. The plaintiffs contend there is a direct and positive conflict between Chapter 90 of Laws of 1961 of the State of Washington and said Highway Beautification Act of 1965 and that in this situation the supremacy clause of the United States Constitution in effect makes the Highway Beautification Act of 1965 paramount and supreme to the Washington Highway Advertising Control Act of 1961 and in those areas where there is conflict those provisions of the Washington Advertising Control Act of 1961 are void. The court has had an opportunity to read plaintiff's exhibits No. 71, 72, 73, and 74 which are the minutes of the hearings before congress both in the house of representatives and in the senate concerning the Federal Highway Beautification Act of 1965 and the court has further had an opportunity to examine both the prior Federal Highway Beautification Act of 1959, on which the Highway Advertising Control Act of 1961 of the State of Washington was based and the Federal Highway Beautification Act of 1965. While our State of Washington Highway Advertising Control Act of 1961 does comply with the original act of congress passed in 1959, the provisions thereof certainly are different than the provisions of the new Federal Highway Beautification Act of 1965. The court in examining both the 1959 Federal Act and the 1965 Federal Act relating to highway beautification, does find that the congress of the United States has laid down a policy as far as the regulation of billboards along highways in which federal aid is provided to the states, including interstate highway systems and state primary systems, but the actual effect

of the acts were apparently designed to offer federal aid as an inducement to the various states to enact and enforce legislation regulating highway advertising — originally only on the interstate system and now on the state primary highway system. In both acts the choice was left with the states to act or not to act in compliance with the federal aid standards and the court can find in neither act any provision in which the federal government has actually itself taken any affirmative act to regulate highway advertising on interstate or state primary highways. In neither federal act has any restriction been placed upon the various states as to enacting more stringent regulation of highway advertising.

From these acts the court can find no provision of same which would show the intent of the federal government to preempt and occupy the field as to highway advertising. While the federal acts declare policy, the acts in themselves impose no regulation upon highway advertising in the state of Washington and until the legislature of the state of Washington acts there will be no regulation of highway advertising in the state of Washington. The federal acts can only be considered as an inducement by the offer of federal aid for the various legislatures of the states to act and regulate highway advertising. There is a serious question as to whether the state of Washington will receive any federal aid for highways unless they comply with the federal act of 1965, but this is not a question that is before the court at this time and it is the opinion of the court that the mere offering of monitory (sic.) aid by the federal government to a state if it will comply with a federal policy can in no way be considered as grounds for invoking the supremacy clause of the United States Constitution to make the federal policy the paramount law within a state and thereby avoiding any state statute in conflict therewith.

The plaintiffs next contend that the State of Washington Highway Advertising Act of 1961 violates the equal protection clause of the federal constitution and the privileges and immunity clause of the state constitution being the 14th Amendment and Article 1, Section 12 of the state constitution respectively. The plaintiffs maintain that there exists a discrimination under the act as between different classes and they refer to the provisions of the act as to on-premise signs as against off-premise signs in the restricted areas and they further refer to the activity sign allowed within twelve miles of the activity, the failure to permit the signs in areas either used or zoned for commercial or industrial purposes and the failure to provide a 660 foot set back as to on-premise signs.

Our supreme court provided the guide lines as to whether a legislative enactment violated the Article 1, Section 2 of the state constitution and the 14th Amendment of the federal constitution in *Clark v. Dwyer,* 56 Wn. 2d 425, 353 P. 2d 941 at 435 where the court stated:

> "Article 1, Section 12 of the state constitution and the fourteenth amendment to the Federal constitution, prohibiting special privileges and immunities and guaranteeing equal protection of the laws, require that class legislation must apply alike to all persons within a class, and reasonable ground must exist for making a distinction between those within, and those without, a designated class."

Within the limits of these restrictive rules, the legislature has a wide measure of discretion, and its determination, when expressed and statutory enactment, cannot be successfully attacked unless it is manifestly arbitrary, unreasonable, inequitable, and unjust.

Under these facts herein the court is satisfied that

the plaintiffs have failed to sustain the burden that the distinctions as to class provided in the act are manifestly arbitrary, unreasonable, inequitable, or unjust. The court is satisfied that a distinction does exist between the on-premise and off-premise signs and if such a distinction does exist then in each class if there is no discrimination, there is no violation of either Article 1, Section 12 of the state constitution or the 14th Amendment of the Federal constitution. The court is satisfied that the reasoning of *Metromedia v. City of Pasadena,* 30 Cal. Rpt. 731 points out the distinction that advertising on premises is a separate business in itself from advertising off premises and certainly depriving advertising on premises along interstate highways and scenic routes could reasonably be expected to make it impossible to conduct such a business. The plaintiffs further argue that these distinctions are arbitrary and capricious in that if this were a valid use of the police power that there is no rational basis for the distinction, because if one is a danger, the other is a danger affecting public safety or welfare. As to the 14th Amendment of the United States Constitution, the United States Supreme Court in *Railway Express v. New York,* 336 U.S. 106 (1948) on page 110 stated:

> "It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."

For the reasons cited above, the court is of the opinion that Chapter 47.42. R.C.W. does not violate the provisions of Article 1, Section 12 of the Washington State Constitution nor the 14th Amendment of the United States Constitution.

The plaintiffs next argue that the Washington Highway Outdoor Advertising Act of 1961 is unconstitutional in that it violates Article 7 of the Constitution of the State of Washington in attempting to dele-

gate legislative power to the highway commission in violation thereof in two respects.

The plaintiffs cite Section 7 of the act which has now been codified as R.C.W. 47.42.060 which reads as follows:

> "The commission shall prescribe regulations for the erection and maintenance of signs permitted by this chapter within protected areas and scenic areas, and other regulations for the administration of this chapter consistent with the policy of this chapter and the national policy set forth in section 131, title 23, United States Code and the regulations promulgated thereunder by the secretary of commerce. Proceedings for review of any action taken by the commission pursuant to this chapter shall be instituted by filing a petition only in the superior court of Thurston county."

And further cites section 8 of the act which has now been codified as R.C.W. 47.42.080 which provides criminal penalties for the violation of any provisions of the act or the regulations promulgated thereunder by the highway commission.

The plaintiffs further cite section 12 of the act which has now been codified as R.C.W. 47.42.120 which provides for the issuance of permits by the highway commission for all signs which are erected or maintained within the restricted areas provided by the act except for signs of types 1, 2, or 3 as provided for under section 4 of the act now codified as R.C.W. 47.42.040.

In the case of *State ex rel, Washington Toll Bridge Authority v. Yelle,* 195 Wn. 636, 82 P. 2d 120 the Supreme Court on page 643 lays down the test as to the power of the legislature to delegate power to an administrative agency as follows:

> "The legislature manifestly cannot delegate the power to make purely substantive law, but may delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action dependant, provided it has enunciated a standard by which an administrative body may be guided."

Our Supreme Court has further held that the standards for the guidance of the administration may be couched in the most general terms. See *Shoreline School Dist. v. Taxpayers,* 52 Wn. 2d 849, 329 P. 2d 829.

The plaintiffs rely for their argument upon the holding of our Supreme Court in the case of *Peterson v. Hagen,* 56 Wn. 2d 48, 351 P. 2d 127 in which the Supreme Court considered the delegation of authority granted by the legislature to an administrative agency concerning the minimum wage act and in which they found that the authority granted was an unlawful delegation of legislative power and the court held on page 62 of that opinion as follows:

> "... The act is devoid of any declared legislative purpose. No standards for the promulgation of rules are to be found anywhere in the statute. The vice of the challenged section is that it fails to distinguish between intrinsic legislative power and administrative rule-making power to execute a declared legislative purpose. Administrative rule-making power must be circumscribed by definite standards. Here there is an undisguised attempt at delegation of pure legislative power. The constitution forbids."

In reviewing the provisions of R.C.W. 47.42.060 the court is satisfied that the legislature has declared a legislative purpose and had provided standards for

the promulgation of rules which was not true in the case of *Peterson v. Hagen,* supra. R.C.W. 47.42.040 limits the type of signs which may be erected and the act itself provides the area in which the act shall be effective and further provides that the rules and regulations must be consistent with the declared legislative purpose and policy of the act as well as the provisions of Section 131 of Title 23, United States Code.

The argument raised by the plaintiffs as to the provisions of R.C.W. 47.42.120 as to permits, is to the effect that under that provision of the act the highway commission could grant permits for all signs and the plaintiff further states this obviously is not the purpose of the act. Yet, the highway commission's discretion under that section is so untrammelled that the results can and have been accomplished. The court is of the opinion that this was not the purpose of R.C.W. 47.42.120 but is a mandate to the highway commission by the legislature, giving no discretion, to the highway commission, but stating that if signs do exist other than those provided for as to signs type 1, 2, or 3 under R.C.W. 47.42.040, within any of the restricted areas provided for by the act, the highway commission must issue a permit for those signs and may revoke the permit under certain specific conditions as provided for by the legislature; such as not keeping the signs in good general condition or in a reasonable state of repair. It is, therefore, the opinion of the court that R.C.W. 47.42.120 does not violate Article 7 of the Constitution of the State of Washington as to the delegation of legislative power to the highway commission.

The next question raised by the plaintiffs is as to whether Chapter 96 of the Laws of 1961 of the State of Washington violates the first amendment of the state constitution concerning free speech. The plain-

tiffs place great stress on their arguments as to this question as to the state statutes violating the first amendment and the court is well aware of the nice question posed by their arguments. A number of states have considered the question. See *Ghaster v. Preston,* 176 Ohio 425, 200 N. E. 2d 328 (1964); *United Adv. v. Borough of Raritan,* 11 N.J. 144, 93 A. 2d 362 (1952).

In *Valentine v. Chrestensen,* 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942) the Supreme Court of the United States in a handbill case held:

> "The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such a pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated. If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct."

The plaintiffs contend that the *Valentine v. Chrestensen* opinion is no longer the law in that in *Cammarano v. United States,* 358 U.S. 498, 3 L.Ed. 2d 462, 79 S.Ct. 524 (1959) changed the holding. However, in examining the case, the only reference made as to whether *Valentine v. Chrestensen* is no longer the law was made by Judge Douglas in a concurring opinion and is not the majority opinion of the court.

It would, therefore, have to be the opinion of the court that as to commercial advertising, the provisions of the first amendment did not apply if as in this case the court has found that the regulations as to billboards is a valid exercise of the police power and the fact that certain public information may be dissemi-

nated by the outdoor advertising business at various times in itself, although not commercial, will not change the basic designation of commercial advertising to evade the operation of the statute. For as stated in *Valentine v. Chrestensen*, supra, on page 55:

> "If that evasion were successful, every merchant who desires to broadcast advertising leaflets in the street need only append a civil appeal, or a moral platitude to achieve immunity from the laws command."

The last question raised by the plaintiffs to which the court will address itself relates to the allegations of the plaintiff that the Chapter 96 of the Laws of 1961 of the State of Washington violates the just compensation clauses and due process clauses of the constitution of the state of Washington and the United States and is therefore unconstitutional.

It has long been the law of the state of Washington that the state validly regulate under its police power even if such regulations may deprive a person of the use of his land, livelihood or some other right that he may otherwise enjoy. In *Campbell v. State*, 12 Wn. (2d) 459, 122 P. 2d 458 (1942) the court stated as follows:

> "Under our decisions, it is the rule that a statute enacted pursuant to the police power of the state cannot be held unconstitutional if it reasonably tends to protect the public welfare or health from a threat or menace of evil, even though the law operates to deprive a citizen of a right he might otherwise enjoy to maintain a business, or pursue a profession, or endeavor to gain livelihood, in the manner prescribed by law."

The court is of the opinion, therefore, that the failure to provide in the statute for compensation as

to lessees to the plaintiffs and to the plaintiffs themselves, does not render any of the provisions of or Chapter 96 of the Laws of 1961 of the State of Washington unconstitutional. However, as specifically provided under Pre-trial Order No. 2 filed herein on March 28, 1966 after a pre-trial conference, the court specifically preserved and provided it would not rule on whether there is a right in inverse condemnation for just compensation when any outdoor advertising structures are actually removed. This order was entered based on the argument of the defendant that there has been no actual taking of property at the time of trial due to the temporary restraining order which has been filed herein and the question of whether just compensation should be granted on either the theory of condemnation or inverse condemnation should be heard by the court when an actual taking has been instituted. The court is also fully aware that the affect of the Federal Highway Beautification Act of 1965 has in itself by the provisions for compensation to the highway advertising industry seriously complicated the problem both as to the plaintiff and defense herein.

The court wishes to comment on one final aspect of his memorandum opinion in that the court has not discussed the question in relation to the police power as to whether aesthetic values or economic well-being to the state by the removal of billboard signs is a valid reason for exercising police power under the general term of welfare. The court has not discussed this matter primarily because of the fact that it has found that there is a valid exercise of police power under safety and that it is not necessary, therefore, to reach any opinion concerning this phase of the case.

It is, therefore, the opinion of the court that Chapter 96 of the Laws of 1961 of the State of Washington

is constitutional as concerning the plaintiffs herein and the temporary injunction entered herein would be dissolved and the cause of action dismissed. The court will sign an appropriate order.

DATED this 18th day of August, 1966.

HEWITT A. HENRY
Judge

APPENDIX F

Opinion of the Supreme Court of Washington of March 26, 1968 (73 W.D.2d 413, 439 P.2d 248 (1968))

No. 39770 — En Banc

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

MARKHAM ADVERTISING COMPANY, INC.; CASEY & STONE COMPANY; COLUMBIA BASIN OUTDOOR ADVERTISING CO.; NORTHWEST OUTDOOR ADVERTISING CORPORATION; NATIONAL ADVERTISING CO.; OBIE OUTDOOR ADVERTISING, INC.; SUNSET OUTDOOR ADVERTISING COMPANY; YAKIMA VALLEY POSTER SERVICE, INC.; GROVER ADVERTISING INC.; individually and as a class, *Appellants,*

FOSTER AND KLEISER, DIVISION OF METROMEDIA, INC., *Plaintiff,*

vs.

THE STATE OF WASHINGTON; WASHINGTON STATE HIGHWAY COMMISSION AND THE HONORABLE MEMBERS THEREOF, CONSISTING OF ERNEST A. COWELL, CHAIRMAN; ROBERT L. MIKALSON, GEORGE D. ZAHN, JAMES M. BLAIR, SR. AND IRVING CLARK, JR., their Officers, Agents and Employees, *Respondents,*

IRA R. GRANT, *Intervenor.*

M. C. BEATIE AND TRANQUILLA KOZAK, *Additional Intervenors.*

Filed March 26, 1968

The question presented by this appeal from the dismissal of plaintiffs' action for a declaratory judgment is the constitutionality of the Highway Advertising Control Act of 1961 (hereafter referred to as

the Act), and certain regulations adopted thereunder (hereafter referred to as the Regulations).

The original plaintiffs (appellants) were 10 outdoor advertising companies comprising virtually the entire outdoor advertising in this state. Three individuals later intervened, one a sign owner and the other two representing the class of landowner-lessors.

A number of groups interested in highway beautification submitted a brief amici curiae supporting the state and the members of the Highway Commission (respondents), who we will hereafter refer to as the defendant or state. Labor organizations representing employees of outdoor advertising firms and Western Outdoor Markets, a California corporation, appeared as amici curiae on behalf of the plaintiffs.

The original complaint alleged that the Highway Advertising Control Act of 1961, RCW 47.42 (Laws of 1961, ch. 96, p.1575, as amended by Laws of 1963, 1st Ex. Ses., ch. 3, p.1287) and the Regulations adopted thereunder by the Highway Commission on May 18, 1961, 3 Washington Administrative Code, ch. 252-40, were unconstitutional. Plaintiffs filed their suit praying for a declaratory judgment and a temporary injunction on February 26, 1964. The injunction was granted on March 9, 1964, and up to the time of the filing of this appeal, the Commission has been prevented from enforcing orders, issued under the Act, requiring the removal of certain advertising signs.

The setting for the issues presented in this case includes two federal statutes in addition to the state legislation and administrative Regulations mentioned above, all of which we will discuss in some detail in order to provide a better understanding of the disposition of this appeal.

In its federal interstate highway program, Congress made provision for control of outdoor advertising. In 1958, Pub.L.No. 85-767, ch. 1, §131, 72 Stat. 904 (Aug. 27, 1958), formerly 23 U.S.C. §131, entitled "Areas adjacent to the Interstate System," (now superseded by Pub.L.No. 89-285, 79 Stat. 1028 (Oct. 22, 1965)), became law. Congress expressed the purpose of this provision as follows:

> "To promote the safety, convenience, and enjoyment of public travel and the free flow of interstate commerce and to protect the public investment in the National System of Interstate and Defense Highways, it is declared to be in the public interest to encourage and assist the States to control the use of and to improve areas adjacent to the Interstate System by controlling the erection and maintenance of outdoor advertising signs, displays, and devices adjacent to that system. §131(a)."

It was declared a "national policy" that the erection and maintenance of advertising signs, displays and devices within 660 feet of the right-of-way of interstate system highways should be "regulated," consistent with national standards to be prepared and promulgated by the Secretary [of Commerce]." Four types of signs were to be permitted within the regulated area, corresponding to the types authorized for "protected areas" under RCW 47.42.040, *infra*. All other signs were prohibited in the 660-foot belt lining the right-of-way. In order to implement the section the Secretary of Commerce was empowered to negotiate agreements with the states concerning

> "provisions for regulation and control of the erection and maintenance of advertising signs, displays, and other advertising devices in conformity with the standards established in accordance with subsection (a) of this section and

> [these agreements] may include . . . provisions for preservation of natural beauty, prevention of erosion, landscaping, reforestation, development of viewpoints . . . , and the erection of markers, signs, or placques, and development of areas in appreciation of sites of historical significance. §131(b)."

Excepted from these agreements, and from the application of the section, were areas along the interstate system that were zoned for industrial or commercial uses under state law. As an inducement for entering into agreements with the Secretary of Commerce, the states were to receive an increase of ½ of 1 percent of the federal share payable on interstate projects.

In 1961, the state legislature enacted the Highway Advertising Control Act, RCW 47.42, the opening section of which declared:

> "The control of signs in areas adjacent to state highways of this state is hereby declared to be necessary to promote the public health, safety, welfare, convenience and enjoyment of public travel, to protect the public investment in the interstate system and other state highways, and to attract visitors to this state by conserving the natural beauty of areas adjacent to the interstate system, and of scenic areas adjacent to state highways upon which they travel in great numbers, and to insure that information in the specific interest of the traveling public is presented safely and effectively. RCW 47.42.010."

The Act designates "protected areas" and "scenic areas" within which "no person shall erect or maintain a sign," except as expressly permitted under the Act. A "protected area" is the strip within 660 feet

of the edge of the right-of-way of interstate system highways. A "scenic area" includes land within 660 feet of a state highway within a public park, federal forest area, public beach, public recreation area, national monument and "any state highway or portion thereof," outside the boundaries of an incorporated city or town, which the legislature may designate. In "protected areas," the four types of signs permitted are:

> "(1) Directional or other official signs or notices that are required or authorized by law;"
>
> "(2) Signs advertising the sale or lease of the property upon which they are located;"
>
> "(3) Signs, not inconsistent with the policy of this chapter and the national policy set forth in section 131 of title 23, United States Code and the national standards promulgated thereunder by the secretary of commerce, advertising activities being conducted at a location within twelve miles of the point at which such signs are located."
>
> "(4) Signs, not inconsistent with the policy of this chapter and the national policy set forth in section 131 of title 23, United States Code and the regulations promulgated thereunder by the secretary of commerce, designed to give information in the specific interest of the traveling public. RCW 47.42.040."

In "scenic areas," the Act allows only signs of types 1, 2 and those of type 3 which advertise activities conducted on the premises. RCW 47.42.060 authorizes the State Highway Commission to prescribe Regulations under the Act.

The Act also provides that any "sign erected or maintained contrary to the provisions of this chapter

or regulations promulgated hereunder shall be a public nuisance," and that the permittee or owner of the property on which the sign is located shall be notified that the sign "must comply with the chapter or be removed." RCW 47.42.080. Signs which are not removed within 15 days of the entry of a removal order may be destroyed. The Act declares it unlawful to maintain, after March 11, 1964, any signs erected prior to March 11, 1961 which do not comply with the Act or the Regulations. RCW 47.42.100. Where such signs are located in areas zoned for industrial and commercial uses, the grace period extends to March 11, 1965.

Except for signs of types 1, 2 and those of type 3 which advertise activities conducted on the premises where the sign is located, no sign may be erected or maintained without a permit issued by the Highway Commission. The Act sets forth the procedures for applying for and renewing permits, as well as for revocation of permits. Finally, the Act authorizes the Highway Commission to enter into agreement with the Secretary of Commerce, as provided for in Pub. L.No. 85-767, ch. 1, §131, *supra*.

The Highway Commission, acting under authority granted it by the Act, issued Regulations on May 18, 1961. 3 WAC, ch. 252.40 *supra*. These Regulations, which are also challenged on this appeal, govern the size and spacing of permitted signs, prohibit signs which are unsightly or dangerous in construction, and limit each property owner to one for sale or lease sign and one sign advertising activities being conducted on the premises. Where a sign advertising activities conducted on the premises bears a trade name, this name may not be more conspicuous than the name of the local activity. The Regulations set forth the procedure for issuing sign permits, and pro-

vide that the Highway Commission may revoke permits for violations of the Act or Regulations.

The plaintiffs amended their complaint on January 20, 1966, to raise the issue of whether 23 U.S.C. §131 (Supp. II, 1967) controls over inconsistent provisions of the state Act. The 1965 federal Highway Beautification Act replaced the former 23 U.S.C. §131, and retitled the section, "Control of Outdoor Advertising." We will briefly describe its essential provisions.

The purpose of the present §131 is stated as follows:

> "(a) The Congress hereby finds and declares that the erection and maintenance of outdoor advertising signs, displays, and devices in areas adjacent to the Interstate System and the primary system should be controlled in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty."

In order to secure state compliance, the 1965 federal Act provides that federal-aid highway funds apportioned on or after January 1, 1968:

> "to any State which the Secretary determines has not made provision for *effective control* of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices . . . shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State . . . until such time as such State shall provide for such effective control. §131(b)." (Italics ours.)

"Effective control" is defined to mean that advertising signs, displays, and devices within 660 feet of the edge of the right-of-way of the interstate and

primary systems shall be limited to:

> "(1) directional and other Official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning the lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, and (3) signs, displays, and devices advertising activities conducted on the property on which they are located. §131(c)."

However, outdoor advertising which is located within commercial or industrial areas zoned under state law, or unzoned and specified in an agreement between the state and the secretary, shall be permitted "while remaining consistent with the purposes of this section...." §131(d).

Subsection (e) of the 1965 federal statute establishes a 5-year grace period for compliance. The statute also provides, in subsection (g):

> "Just compensation shall be paid upon the removal of the following outdoor advertising signs, displays, and devices —
>
> "(1) those lawfully in existence on the date of enactment of this subsection,
>
> "(2) those lawfully on any highway made a part of the interstate or primary system on or after the date of enactment of this subsection and before January 1, 1968, and

"(3) those lawfully erected on or after January 1, 1968."

The federal government will pay a 75 per cent share of any such compensation. In the case of states which have entered into an agreement with the Secretary of Commerce pursuant to the former federal statute of 1958, the federal bonus of ½ of 1 per cent is still payable, so long as "the state maintains the control required under such agreement or the control required by this section, whichever control is stricter."

An additional provision of the Highway Beautification Act of 1965, Pub.L.No. 89-285, §401, 79 Stat. 1028, declares:

> "Nothing in this Act or the amendments made by this Act shall be construed to authorize private property to be taken or the reasonable and existing use restricted by such taking without just compensation as provided in this Act."

The principal differences between the 1958 and 1965 federal statutes, for the purposes of this opinion, are two. The 1965 law, instead of conditioning a bonus upon the recipient state's signing an agreement with the Secretary of Commerce, imposes a penalty in terms of a reduction of federal aid if the state fails to make "provision for effective control" of outdoor advertising. Secondly, the 1965 statute provides for payment of "just compensation" for the removal of advertising signs, displays and devices, and allots a 75 per cent share of the cost involved to the federal government.

The trial of this case occupied 15 days, during which time 26 witnesses testified and 122 exhibits were introduced. The statement of facts before us exceeds 1,900 pages. The parties agreed to a stipulation of facts which we summarize as follows.

The plaintiffs, except the intervenors, are firms engaged in the business of outdoor display advertising in this state. Their "plants" include outdoor advertising signs and structures which they own and maintain. Generally, the land on which these plants are located is leased, not owned. The lease terms vary, but typically are for from 1 to 10 years. The plaintiff firms own or operate approximately 7,631 advertising structures within this state. At least 470 of these are affected by the Highway Advertising Control Act of 1961.

Between 1½ and 10 per cent of the plaintiffs' sign structures are relocated annually, and depreciation is scheduled over periods varying from 7 to 12½ years. The standard size for poster panels is 300 square feet, but the panels on some of the affected advertising structures are as large as 600 square feet.

All of the advertising structures involved in this suit were lawfully erected prior to the 1961 state Act. Some are located in rural areas; some in suburban areas outside the boundaries of incorporated cities and towns; some within the corporate limits of cities and towns; and others within areas where the land is zoned for commercial or industrial use. As a rule, the structures are located along high-volume highways in positions deemed best able to attract motorists' attention. None of the plaintiffs' signs along interstate or scenic routes advertise activities conducted on the premises upon which they are located.

The structures affected by the 1961 state Act are only a portion of each advertising company plaintiff's plant, and are primarily employed for the advertising of nationally distributed products by nationally operating firms. The structures are also used to some extent by local businesses to advertise local products. The plaintiffs' signs occasionally display noncommer-

cial messages dealing with political, religious, community and philanthropic matters, and may be hired by the public for such purposes at all times.

The Highway Commission has ordered the plaintiffs to remove those advertising structures which do not comply with RCW 47.42. When and if the courts will permit, the Commission intends to enforce its orders without paying compensation to the persons affected. In that event, the plaintiffs anticipate monetary losses aggregating not less than $150,000.

Of the facts which generated this voluminous record, those in contest relate mainly to whether or not outdoor advertising has an adverse effect upon highway safety. The plaintiffs called Dr. Ernest Blanche, a specialist in mathematics and statistical analysis, who testified that in his opinion there was no significant relationship between accidents and the presence of advertising structures along the highways. They also presented Dr. Reuel A. Sherman, a vision specialist, who testified that billboards heighten driver alertness and thus contribute to, rather than detract from, traffic safety. In rebuttal, the state presented Dr. Zygmunt Birnbaum, Professor of Mathematics and Director of the Laboratory of Statistical Research at the University of Washington, who critically examined the methods and data of Dr. Blanche and concluded that their probative value was questionable. Dr. Harold R. Blackwell, Professor Biophysics, Physiological Optics, and Opthamology, and Director of the Institute for Research and Vision at Ohio State University testified for the defense concerning the amount of time a motorist requires to read a billboard —the driver's inattention interval. An experiment he had conducted indicated that this interval may be as long as 8 seconds. Dr. Blackwell explained that the driver's focusing his attention off the highway sev-

erely reduces his ability to detect and react to highway hazards. He described how a driver's nighttime vision is temporarily impaired when the driver shifts his eyes from the highway to a lighted signboard. Defendant also called Mr. William R. Curry, Assistant Traffic Engineer of the State Highway Department, who testified that an automobile moving at freeway speeds would travel between 470 and 800 feet during the time interval in which a motorist's eyes were diverted from the road by a billboard. His opinion was that driver inattention at high speeds and on heavily traveled highways is particularly dangerous. He testifiied that drivers must be very attentive to road conditions at intersections and interchanges and that billboards tend to be located in such areas. He concluded that outdoor advertising signs are a definite traffic safety hazard. The state also produced evidence that, despite repeated warnings from the Highway Department, outdoor advertising signs were serviced and maintained in such a way as to violate the access limitations on freeways.

The case was tried by the court, sitting without a jury, and judgment was given for the state. The court entered extensive findings of fact which we condense as follows.

1. The defendant introduced sufficient evidence to permit reasonable men to find that a reasonable relationship exists between outdoor advertising and traffic safety. The evidence indicates that (a) outdoor advertising structures along the highways are intended to, and do, cause inattention to the driving task which, in turn, results in increased stopping distances and driver reaction times. Such factors contribute to traffic accidents; (b) plaintiffs' advertising structures are sometime serviced from highway shoulders and rights-of-way, in violation of highway access limitations imposed to promote traffic safety; (c) advertising signs

compete with official highway signs for driver attention, and decrease the effectiveness of cautionary and directional messages essential for the safety of the traveling public; (d) highway billboards, which cause driver inattention, are contrary to the principles of modern interstate highway design, since highways are being built to permit higher speeds and increased traffic loads, thus placing greater demands on motorists' attention and alertness; (e) intersections on interstate highways are particularly dangerous areas due to the frequency and nature of traffic movements. Also, officials signs in such areas, directing safe travel of motorists, are more numerous than in other locations along the highways. Driver inattention in intersection areas is more seriously dangerous than in other areas.

2. Signs located more than 660 feet from the highway are less obtrusive and are less like to constitute a traffic safety hazard than signs ~~located~~ closer to the right-of-way.

3. Driving for pleasure is the most popular outdoor recreational activity in the Nation and in this state, and modern highways are designed with this fact in mind.

4. Roadside advertising in scenic areas is detrimental to the appearance of these areas and is inconsistent with the purpose for which these areas were established.

5. A factual distinction exists between signs advertising activities conducted on the premises and signs advertising activities being conducted off-premises, because on-premises signs are a part of the on-premises business, while off-premises signs are a separate business, not otherwise related to activities conducted on the land.

6. A 12-mile distance is a reasonable limit within which to permit local and roadside business to use advertising signs.

7. In passing the Highway Beautification Act of 1965, *supra,* Congress did not intend to preempt the subject of highway advertising control. Rather, Congress intended to encourage the states to control highway advertising by making it financially advantageous for a state to do so.

The judgment which entered on the court's findings of fact and conclusions of law determined that RCW 47.42 is constitutional under the constitutions of the United States and the state of Washington, and that the Regulations issued by the Highway Commission as 3 WAC, ch. 252-40, *supra,* are valid. The court further ordered that the temporary injunction issued at the commencement of suit be dissolved.

Nine of the advertising firm plaintiffs perfected this appeal from the judgment rendered. Eleven organizations concerned with highway beautification submitted an amici curiae brief on behalf of the defendant.

Plaintiffs first contend that Congress, by the 1965 federal statute, *supra,* intended to displace contrary or inconsistent provisions in the laws of this state, and in that respect has preempted, under the Supremacy Clause of the federal constitution, this field of legislation. Their argument in support of this contention is based both on the conflicts between the federal statute and RCW 47.42, and on the allegedly mandatory language employed by Congress. The federal statute says, "just compensation shall be paid upon the removal of . . . outdoor advertising signs, displays, and devices" 23 U.S.C. §131(g) (Supp. II, 1967); while the state law provides for regulating

billboards under the police power, without requiring the payment of compensation for any losses caused. Plaintiffs maintain that the quoted language is mandatory, and claim that §401, Pub.L.No. 89-285, *supra,* supports their conclusion. Further, the federal statute does not reach outdoor advertising in areas zoned industrial or commercial under state law, while RCW 47.42 makes no such exception. Again, the federal statute provides for a 5-year grace period before outdoor advertising signs must be removed but the state legislation allows a shorter time. There are other points of difference between the two statutes which we need not set forth specifically, since the issue is adequately presented by the above discussion.

In determining whether federal preemption is involved in this case, we turn to the guidelines set down in *Kelly v. Washington ex rel. Foss Co.,* 302 U.S. 1, 82 L.Ed. 3, 58 Sup. Ct. 87 (1937), where the court said at 9 and 10:

> "Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. *Minnesota Rate Cases,* 230 U.S. 352, 402. States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly

established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so "direct and positive" that the two acts cannot "be reconciled or consistently stand together." (Citing cases.)"

The basic question is simply, what did Congress intend? We must read Congressional intent from the language and effect of the statute here under consideration, 23 U.S.C. §131 (Supp. II, 1967). Statuory intent cannot be ascertained from one sentence, or even one paragraph, read in isolation.

"A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Horack, 2 Sutherland Statutory Construction 336, §4703 (3d ed. (1943))."

The 1965 federal statute must be considered as a whole.

Our examination of §131, *supra,* leads us to conclude that its essential operation is to condition payment of 10 per cent of a state's share of federal-aid highway funds upon the state's exercise of its powers to regulate outdoor advertising in a manner consistent with federal standards. We think that the purpose of the federal statute is obviously to induce the states to act, not to require them to do so. The statute allows the state to choose between foregoing 10 per cent of its allotment of federal-aid highway funds and compliance. If Congress had intended the provisions of 23 U.S.C. §131 (Supp. II, 1967) to be mandatory on the states, there would have been no need to attach a monetary penalty to noncompliance. See *South-*

eastern Dislays v. Ward, 414 S.W.2d 573 (Ky. 1967). We hold that Congress has not invoked the Supremacy Clause by preempting the field of regulation covered by the state Act; that 23 U.S.C. §131 (Supp. II, 1967) is directory, and does not interfere with the application of the Act as written.

The plaintiffs next contend that RCW 47.42 is an unconstitutional exercise of the police power. The rule is well established that a party attacking a statute has the burden of showing why it is constitutionally defective. *Lenci v. Seattle,* 63 Wn.2d 664, 388 P.2d 926 (1964); *Clark v. Dwyer,* 56 Wn.2d 425, 353 P.2d 941 (1960), *cert. den.* 364 U.S. 932, 5 L.Ed.2d 365, 81 Sup. Ct. 379 (1961).

In *Lenci v. Seattle, supra,* we said at 667:

> "The burden of establishing the invalidity of an ordinance rests heavily upon the party challenging its constitutionality. *Letterman v. Tacoma,* 53 Wn.2d 294, 333 P.2d 650. Every presumption will be in favor of constitutionality. *Winkenwerder v. Yakima,* 52 Wn.2d 617, 328 P.2d 873. And, if a state of facts justifying the ordinance can reasonably be conceived to exist, such facts must be presumed to exist and the ordinance passed in conformity therewith. *Shea v. Olson,* 185 Wash. 143, 53 P.2d 615, 111 A.L.R. 998. These rules are more than mere rules of judicial convenience. They mark the line of demarcation between legislative and juudicial functions."

In *Clark v. Dwyer, supra,* this court stated at 431:

> "It must be borne in mind that the state constitution is not a grant, but a restriction on the law-making power, and the power of the legislature to enact all reasonable laws is unrestrained

except where, either expressly or by fair inference, it is prohibited by the state and federal constitutions. Where the validity of a statute is assailed, there is a presumption of the constitutionality of the legislative enactment, unless its repugnancy to the constitution clearly appears or is made to appear beyond a reasonable doubt. *Port of Tacoma v. Parosa,* 52 Wn.2d 181, 324 P.2d 438; *In re Bartz,* 47 Wn.2d 161, 287 P.2d 119; *Union High School Dist. No. 1 v. Taxpayers of Union High School Dist. No. 1,* 26 Wn.2d 1, 172 P.2d 591. Where possible, it will be presumed that the legislature has affirmatively determined any special facts requisite to the validity of the enactment, even though no legislative finding of fact appears in the statute. *State ex rel. Collier v. Yelle,* 9 Wn.2d 317, 333, 115 P.2d 373."

The plaintiffs assert that the Act constitutes an invalid exercise of the police power for the reason that it does not bear a reasonable and substantial relation to a proper legislative purpose. The test for this determination is stated in *Ragan v. Seattle,* 58 Wn.2d 779, 783, 364 P.2d 916 (1961), as follows:

"Do the regulations have a reasonable and substantial relation to the accomplishment of some purpose fairly within the legitimate range or scope of the police power and not violate any direct or positive mandate of the constitution? *Nebbia v. New York* (1933), 291 U.S. 502, 78 L.Ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469; *State v. Canyon Lbr. Corp.* (1955), 46 Wn.2d 701, 284 P.2d 316; *State v. Dexter* (1949), 32 Wn.2d 551, 202 P.2d 906; 13 A.L.R.2d 1081; *Campbell v. State* (1942), 12 Wn.2d 459, 122 P.2d 458; *Shea v. Olson* (1936), 185 Wash. 143, 53 P.2d 615, 111 A.L.R. 998; *Seattle v. Proctor* (1935) 183 Wash.

293, 48 P.2d 238; 13 A.L.R.2d 1081."

The plaintiffs argue that the legislature could not reasonably have found that RCW 47.42 will promote traffic safety, that this is therefore not the real purpose of the Act, and that the other purposes of the Act are not within the scope of the police power. They claim to have overcome the presumption of validity with which legislative findings are clothed.

The evidence plaintiffs presented at the trial failed to convince the trial court. We are satisfied that the trial court's finding, that there is a substantial relation between traffic safety and the regulation of outdoor advertising, is amply supported by the record; and we hold that a purpose of the Act is to promote traffic safety. This is clearly a proper purpose for the exercise of the police power.

However, the plaintiffs maintain that the basic purpose of the Act is to promote aesthetic values, and that for that reason the Act is invalid. We have held that it is no objection to a police power law to say that one of its purposes is to promote aesthetic values. *Lenci v. Seattle, supra.* Moreover, this court does not accept the narrow view of the public welfare which plaintiffs urge upon us. We have many times emphasized the broad scope of the police power. In *Shea v. Olson,* 185 Wash. 143, 53 P.2d 615, 111 A.L.R. 998 (1936), we said at 153:

> "However difficult it may be to give a precise or satisfactory definition of "police power," there is no doubt that the state, in the exercise of such power, may prescribe laws tending to promote the health, peace, morals, education, good order and welfare of the people. Police power is an attribute of sovereignty, an essential element of the power to govern, and a function that cannot be

> surrendered. It exits without express declaration, and the only limitation upon it is that it must reasonably tend to correct some evil or promote some interest of the state, and not violate any direct or positive mandate of the constitution."

The above language was recently quoted with approval in *Clark v. Dwyer, supra,* and substantially restated in *Treffry v. Taylor,* 67 Wn.2d 487, 408 P.2d 269 (1965). Mr. Justice Douglas, writing of the police power in *Berman v. Parker,* 348 U.S. 26, 32, 99 L.Ed. 27, 75 Sup. Ct. 98 (1954), characterized it as follows:

> "An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, ..."

The legislature has declared that the Act is intended to promote the "... convenience and enjoyment of public travel," "to protect the public investment in ... highways," "... to attract visitors to this state," and to conserve "the natural beauty of areas" adjacent to our highways. RCW 47.42.010. We have no doubt that purposes such as these are properly included within the scope of the "public welfare". Other courts have reached the same conclusion. The Massachusetts Supreme Judicial Court stated in *General Outdoor Advertising Co. v. Dept of Public Works,* 289 Mass. 149, 185, 187, 193 N.E. 799 (1935):

"The phrase 'aesthetic considerations' in our opinion has commonly been applied to regulations as to the character, form and appearance of constructions to be erected. The rules and regulations here in question have different aims. They do not rest primarily upon aesthetic considerations in the sense in which that phrase has been used to overturn legislative enactments. They are designed to promote safety of travel upon the highways, and enjoyment of resort to public parks and reservations, to shield travellers upon highways from the unwelcome obtrusion of business appeals, to protect property from depreciation, and to make the Commonwealth attractive to visitors from other States and countries as well as to her own citizens. The rules and regulations are so phrased as to permit the exclusion of billboards and other advertising devices from territory whose scenic beauty would be especially harmed by their presence. . . . Grandeur and beauty of scenery contribute highly important factors to the public welfare of a State. To preserve such landscape from defacement promotes the public welfare and is a public purpose. . . It is, in our opinion, within the reasonable scope of the police power to preserve from destruction the scenic beauties bestowed on the Commonwealth by nature in conjunction with the promotion of safety of travel on the public ways and the protection of travellers from the intrusion of unwelcome advertising."

The New Hampshire Supreme Court stated in *Opinion of the Justices,* 103 N.H. 268, 270, 271, 169 A.2d 762 (1961):

"It seems unnecessary to decide here whether aesthetic considerations alone furnish ground for the exercise of the police power as is increasingly

> stated by modern authorities . . . though denied under earlier decisions. . . . In any event, in this day and age we do not believe that such can be entirely ignored and without stating that they are decisive, we hold that the maintenance of the natural beauty of areas along interstate highways is to be taken into account in determining whether the police power is properly exercised." (Citations omitted.)
>
> "Bearing in mind all the factors involved, in our opinion the regulation of outdoor advertising along interstate highways is a valid exercise of the police power."

The Ohio Supreme Court in *Ghaster Properties, Inc. v. Preston,* 176 Ohio St. 425, 438, 200 N.E.2d 328 (1964), stated:

> "In considering whether a proposed statute prohibiting billboards adjacent to a highway bears a real and substantial relation to the public welfare, the General Assembly may properly give weight not only to its effect in promoting public safety but also to its effect in promoting the comfort, convenience and peace of mind of those who use the highway, by removing annoying intrusions upon that use."

Also see *New York State Thruway Authority v. Ashley Motor Court, Inc.,* 10 N.Y.2d 151, 176 N.E.2d 566, 218 N.Y.S.2d 640 (1961).

We may take judicial notice of the fact that this state is richly endowed with scenic beauty and that one of the common purposes of travel along our highways is to enjoy that beauty. The public welfare embraces healthful recreation and the protection of our national resources. As the United States Supreme Court has said:

> "The concept of the public welfare is broad and inclusive.... The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. *Berman v. Parker, supra,* at 33."

We hold that the purposes of the Act as expressed in RCW 47.42.010, *supra,* are within the legitimate scope of the police power.

The plaintiffs further argue that the Act bears no reasonable and substantial relation to the accomplishment of these purposes. The applicable test is stated in *Ragan v. Seattle, supra.* We agree with the trial court that, since the result intended in RCW 47.42 is to remove roadside structures which draw driver attention and obstruct the view of the landscape, prohibiting the "erection" and "maintenance" of such structures, under the conditions established by the provisions of the Act and the Regulations, is a means reasonably and substantially adapted to that end.

Plaintiffs also contend that the Act is an improper exercise of the police power because it is manifestly unreasonable and unnecessary. As we said in *State ex rel. Davis-Smith Co. v. Clausen,* 65 Wash. 156, 178, 117 Pac. 1101 (1911):

> "[T]he test of a police regulation, when measured by... [the due process] clause of the constitution, is reasonableness, as contradistinguished from arbitrary or capricious action."

Our consideration of this contention again begins with the presumption that the Act is reasonable and necessary. *Lenci v. Seattle, supra; Clark v. Dwyer,*

supra. We are required to decide, first, whether the Act is manifestly or palpably arbitrary or capricious, and second, whether plaintiffs have succeeded in refuting the presumption of reasonableness and necessity.

We find, considering the Act's purposes, language and effect that it is reasonable and necessary and not arbitrary or capricious. We further hold, taking the Act as a whole considered with the record in this case, that the plaintiffs have not refuted the presumption of reasonableness attaching to legislative enactments under the police power.

The plaintiffs, however, assert that the legislature may not declare a "legitimate" business a nuisance under the police power, and that in any event such a declaration may not apply to an existing "legitimate" business. Neither of these objections has merit. It is within the police power to declare a previously unregulated business a nuisance in fact and law. *Reinman v. Little Rock,* 237 U.S. 171, 59 L.Ed. 900, 35 Sup.Ct. 511 (1914). See *Sittner v. Seattle,* 62 Wn.2d 834, 384 P.2d 859 (1963). The legislature may also apply such legislation to existing businesses. *Ghaster Properties, Inc. v. Preston, supra; Moore v. Ward,* 377 S.W.2d 881 (Ky. 1964).

Plaintiffs also claim that the Act is unreasonable because it does not afford a sufficiently long amortization period for their "vested property rights." The court in *Ghaster Properties, Inc. v. Preston, supra,* answered this argument by pointing to the distinction between the type of measure represented by RCW 47.42 and a zoning regulation:

> "[T]he statutes involved in the instant case make the use of land for billboard purposes within 660 feet of an interstate highway unlawful

> and a nuisance. Unlike in the zoning cases, their continued use for such purposes will not merely be a lawful use that does not conform with a zoning restriction but a use that is unlawful and a nuisance either in or out of any zoning district. . . . at 441."

This court has said that it is within the legislature's power to forbid a use altogether without making any provision for an amortization period. *State v. Thomasson,* 61 Wn.2d 425, 427, 378 P.2d 441 (1963); *State ex rel. Miller v. Cain,* 40 Wn.2d 216, 219, 242 P.2d 505 (1952). Under all the circumstances, we are satisfied that the amortization period provided in the Act is reasonable.

The plaintiffs also maintain that *Seattle v. Ford,* 144 Wash. 107, 257 Pac. 243 (1927), requires us to apply a higher standard of "reasonableness" when the police power measure being tested is one which regulates a business, not harmful in itself, being conducted on private property. The case is not apposite to the facts of the instant case. We do not agree that outdoor advertising here is conducted completely on private premises. A billboard is located in such a manner as to command public attention. Even though it may be on private property the viewer is on a public way. Both elements, the sign and the viewer, are essential to the operation of the business. "[T]he use prohibited by these statutes is in substance and effect a use of the public highway for advertising purposes." *Ghaster Properties, Inc. v. Preston, supra,* at 442. The plaintiffs' business is clearly one which involves a substantial public interest, and one which the state, under the police power, may appropriately regulate.

Many other courts, considering like statutes, support our conclusion that the regulation of outdoor advertising is a reasonable and proper exercise of the police

power; *Moore v. Ward, supra; Ghaster, Inc. v. Preston, supra; Opinion of the Justices, supra; New York State Thruway Authority v. Ashley Motor Court, Inc., supra; General Outdoor Advertising Co. v. Dept. of Public Works, supra; Hav-a-Tampa Cigar Co. v. Johnson,* 149 Fla. 148, 5 So.2d 433 (1941). We know of only one court which has invalidated a statute of this type, and we find the opinion singularly unpersuasive. *State Highway Dept. v. Branch,* 222 Ga. 770, 152 S.E.2d 372 (1966).

Plaintiffs further contend that the Act deprives them of due process of law because it authorizes the taking of their property without compensation. U.S. Const. amend. 14; Const. art. 1, §3. When a court determines, as we have in this case, that the police power has been properly invoked, there is no basis for this contention. *Atlantic Coast Line R.R. Co. v. Goldsboro,* 232 U.S. 548, 558, 58 L.Ed. 721, 34 Sup. Ct. 364 (1914); *New York State Thruway Authority v. Ashley Motor Court, supra,* at 644. The police power represents the assertion of the paramount rights of the community at large. "The possession and enjoyment of all rights are subject to this power." *State ex rel. Davis-Smith Co. v. Clausen, supra,* at 178. Plaintiffs' due process rights have been secured to them once it has been determined that the exercise of the police power is in harmony with constitutional requirements. It should be noted that our research discloses that 23 of the states which have enacted legislation comparable to RCW 47.42, have also made no provision for the payment of compensation under their statutes.

The plaintiffs contend that the Act is contrary to the equal protection clause of the fourteenth amendment to the federal constitution and the privileges and immunities clause of the state constitution, art. 1, §12. These provisions have the same import, and we apply them as one.

In the recent case of *Seattle v. See,* 67 Wn.2d 475, 486, 408 P.2d 262 (1965), we stated the following regarding the requirements for valid legislative classifications:

> "The guarantee of equal protection of the laws and the prohibition of special privileges and immunities require that class legislation apply alike to all persons within a class, and reasonable ground must exist for making a distinction between those within and those without a specified class. *Clark v. Dwyer,* 56 Wn. 2d 425, 353 P.2d 941 (1960). 'The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.' *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 489, 99 L. Ed. 563, 75 Sup. Ct. 461 (1955).... The United States Supreme Court has, on another occasion, stated, 'Equal protection does not require identity of treatment.' *Walters v. St. Louis,* 347 U.S. 231, 237, 98 L. Ed. 660, 74 Sup. Ct. 505 (1954). The very act of classification involves some degree of discrimination. Equal protection 'only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary.' *Walters, supra.* There is remaining a wide area of legislative discretion."

In *State v. Persinger,* 62 Wn.2d 362, 368, 369, 382 P.2d 497 (1963), we further stated:

> "When a statutory classification is challenged, if any state of facts reasonably can be conceived that will sustain it, there is a presumption that such facts exist. The burden is upon the one who assails the classification of showing that it fails

to rest upon any reasonable basis and is essentially arbitrary."

Plaintiffs argue that the Act and the Regulations are invidiously arbitrary and discriminatory in many of the classifications that they establish. We have considered all of the objections raised, and we agree with the trial court that these classifications are reasonable. We can conceive of a state of facts which justifies every classification here attacked, and this requires us to uphold the Act and the Regulations. *State v. Persinger, supra.*

Plaintiffs further contend that the Act transgresses first amendment guarantees of freedom of speech. In *Valentine v. Chrestensen,* 316 U.S. 52, 86 L. Ed. 1262, 62 Sup.Ct. 920 (1942), the court said at 54:

> "We are ... clear that the constitution imposes no ... restraint on government as respects purely commercial advertising."

The decision upheld the validity of a New York City ordinance regulating the distribution of handbills. In the instant case, the question is whether the public's right to enjoy the highways free of the dangerous, obtrusive, and unsolicited presence of advertising structures is outweighed by the minimal free speech interest claimed by plaintiffs. As Mr. Justice Brandeis observed in *Packer Corp. v. Utah,* 285 U.S. 105, 110, 76 L.Ed. 643, 52 Sup.Ct. 273 (1932):

> "Billboards, street car signs, and placards and such are in a class by themselves.... Advertisements of this sort are constantly before the eyes of observers on the streets ... to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer .... The radio can be turned off, but not so the bill-

board...."

Speaking of outdoor advertising, the court in *General Outdoor Advertising Co. v. Dept. of Public Works, supra,* said at 168:

> "[I]t is forcibly thrust upon the attention of all such persons [who travel on the highways], whether willing or averse. For such persons who strongly wish to avoid advertising intrusion, there is no escape; they cannot enjoy their natural and ordinary rights to proceed unmolested."

This intrusive quality of highway outdoor advertising, coupled with the hazard it poses to traffic safety and its purely commercial nature, all persuade us that RCW 47.42 is a reasonable regulation which does not violate the First Amendment. There is no blanket requirement that the legislature must subordinate all other legitimate public interests to the protection of free speech. As stated by the United States Supreme Court in *Kovacs v. Cooper,* 336 U.S. 77, 88, 93 L.Ed. 513, 69 Sup.Ct. 448 (1949):

> "The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself."

Plaintiffs' final contention is that RCW 47.42 is an unlawful delegation of legislative powers under our state constitution, art. 2, §1, amendment 7. They argue that the Act does not provide adequate standards for the Highway Commission to follow in issuing Regulations. A legislative delegation is tested by the standards we set forth in *Miller v. Tacoma,* 61 Wn.2d 374, 378 P.2d 464 (1963), at 388, 389:

The rule is succinctly stated in *Keeting v. Public Util. Dist. No. 1,* 49 Wn. 2d 761, 767, 306 P. 2d 762 (1957).

> "It is unconstitutional for the legislature to abdicate or transfer to others its legislative function. It is not unconstitutional for the legislature to delegate administrative power. In so doing, the legislature must define (a) what is to be done, (b) the instrumentality which is to accomplish it, and (c) the scope of the instrumentality's authority in so doing, by prescribing reasonable administrative standards."

In the case at hand the legislature has declared its purpose, at length, in RCW 47.42.010. Moreover, the instrumentality has been designated and its allowed scope of authority has been defined in RCW 47.42.060, where the Highway Commission is authorized to issue Regulations

> "... for the erection and maintenance of signs permitted by this chapter within protected areas and scenic areas, and other regulations for the administration of this chapter *consistent with the policy of this chapter* and the *national policy* set forth in section 131, title 23, United States Code and the *regulations promulgated thereunder.* ... (Italics ours.)"

We think that the administrative standards prescribed by the legislature under the Act are adequate and reasonable. We approved the practice of referring state administrative rules and regulations to federal requirements in *Yelle v. Bishop,* 55 Wn.2d 286, 347 P.2d 1081 (1959). Under the circumstances of this case, we find no improper delegation of legislative power.

The decision of the trial court is affirmed in all respects.

HUNTER, J.

WE CONCUR:

FINLEY, C. J.
WEAVER, J.
ROSELLINI, J.
HAMILTON, J.
HALE, J.
NIELL, J.

FINLEY, C. J. (concurring) — I have signed and concur fully in the majority opinion. However, because of the very apparent disparity in the majority's and the dissent's description of the legal issues involved in this case, I feel it is necessary and appropriate to make this short supplemental statement.

The dissent mounts a spirited, and somewhat caustic and stinging verbal attack on something. However, this leaves me a bit uncertain as to the reasons for the sortie and even more dubious as to its objective, *i.e.*, whether the legislature, the statute, or the majority opinion, is the target of the assault. In any event, I can say, or will concede that, it does seem to me the dissent is basically concerned about the legislative judgment made in the course of enactment of the statute involved in this appeal, said judgments having been made by one branch of our tripartite-structured government, traditionally regarded as a constitutionally separate, independent and equal branch of state government.

It is my conviction that the legislative judgments made in the enactment of the statute are within the constitutional prerogatives of the legislative branch. Furthermore, I believe this is amply demonstrated or documented by the majority opinion. Finally, I feel

some compulsion to say that it seems to me the legislative judgments consummated in the enactment of the statute merit, or even require, the exercise of judicial self-restraint of a very high order, rather than judicial remonstrance.

In other words, in terms of our appellate judicial function, let us render unto the legislators what is theirs, rightfully and constitutionally, in the matter of legislative judgments respecting the exercise of state police power under our state constitution. As Holmes, J., in a slightly different context, once remarked: "I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibiions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain." *Tyson & Brother v. Banton,* 273 U.S. 418, 446 (1927) (Holmes, J., dissenting).

FINLEY, C. J.

HILL, J. (dissenting) — I dissent. I see in the majority opinion only a very well written defense and justification of legislation which would never have been enacted if it had not been necessary to avoid a penalty in the terms of a reduction of federal aid for our highway program. The majority explains the situation clearly:

> "The principal difference between the 1958 and 1965 federal statutes, for the purposes of this opinion, are two. The 1965 law, instead of conditioning a bonus upon the recipient state's signing an agreement with the Secretary of Commerce, imposes a penalty in terms of a reduction of federal aid if the state fails to make "provision

for effective control" of outdoor advertising."

In short, we dance to the federal tune.

Our slips are showing only too plainly when we pontificate about getting rid of billboards within 660 feet of our Interstate and Defense Highways to promote the public health, welfare, safety, convenience, and the enjoyment of public travel (not to mention the spiritual and aesthetic values referred to in the majority opinion), and then permit signs advertising activities being conducted within 12 miles of the point at which the signs are located. Does the fact that the activity being advertised is relatively close at hand make the sign less dangerous to the public health, safety, welfare, convenience, and the enjoyment of public travel (not to mention the effect upon spiritual and aesthetic values involved). Are we so devoid of all humanitarian and aesthetic instincts that we do not extend this beneficient protection of the public health, welfare, safety, convenience, and the enjoyment of public travel (not forgetting the aesthetic and spiritual values) to those citizens who have to drive on our other state highways and our country roads? Are the travelers on such roads second class citizens whose health, welfare, safety, convenience, enjoyment, and aesthetic senses are to be neglected?

Insofar as protection of our scenic beauties are concerned, we are certainly beginning on the wrong highways. These "Interstate and Defense Highways" are not located with regard to scenic beauties, but to the shortest, fastest feasible routes between centers of population. Our really scenic roads, such as Chuckanut Drive, are not protected by this legislation.

If there exists a public necessity for the removal of billboards from our highways, let us stop the pretense that we are operating under the police power, and

condemn the right to erect billboards within a designated distance of our highways as we condemn access and other property rights.

Even the federal government manifests some concern for the property rights of an established and heretofore lawful business by offering to bear three-quarters of the cost of the payment of "just compensation" for the removal of existing signs; while we, motivated by the "federal bonus of ½ of 1 per cent" and the desire to save one-quarter of the cost of that removal, decide that no compensation is necessary because these established signs are a menace to the health, welfare, safety, convenience, and enjoyment of the traveling public and are likewise an affront to their spiritual and aesthetic values.

HILL, J.

APPENDIX G

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 39770

MARKHAM ADVERTISING COMPANY, INC., *et al.*,
Appellants,

v.

THE STATE OF WASHINGTON, *et al., Respondents.*

Order Denying Petition for Rehearing and Changing Opinion of the Supreme Court of Washington of July 19, 1968

IT IS HEREBY ORDERED that the opinion of the Court in the above cause, as the same appears at 73 W.D.2d 413, be changed as follows:

The second sentence of the second full paragraph on page 429, which reads:

> "We are satisfied that the trial court's finding, that there is a substantial relation between traffic safety and the regulation of outdoor advertising is amply supported by the record; and we hold that a purpose of the Act is to promote traffic safety."

is stricken and the following sentence is inserted in lieu thereof.

> "We are satisfied that the trial court's implicit finding, that there is a substantial relation between traffic safety and the regulation of outdoor advertising, is amply supported by the record; and we hold that a purpose of the Act is to promote traffic safety."

IT IS FURTHER HEREBY ORDERED that appellants' petition for rehearing be denied.

Dated at Olympia, Washington, this 19th day of July, 1968.

ROBERT C. FINLEY
Chief Justice

ROBERT HUNTER

ORRIS L. HAMILTON

FRANK P. WEAVER

HUGH ROSELLINI

APPENDIX H

Judgment of the Superior Court of the State of Washington for the County of Thurston of March 10, 1967

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

No. 35570

MARKHAM ADVERTISING COMPANY, INC.; CASEY & STONE COMPANY; COLUMBIA BASIN OUTDOOR ADVERTISING CO.; FOSTER AND KLEISER, DIVISION OF METROMEDIA, INC.; NORTHWEST OUTDOOR ADVERTISING CORPORATION; NATIONAL ADVERTISING CO.; OBIE OUTDOOR ADVERTISING COMPANY; SUNSET OUTDOOR ADVERTISING COMPANY; YAKIMA VALLEY POSTER SERVICE, INC., individually and as a Class, *Plaintiffs*,

vs.

THE STATE OF WASHINGTON; WASHINGTON STATE HIGHWAY COMMISSION and THE HONORABLE MEMBERS THEREOF, CONSISTING OF ERNEST A. COWELL, CHAIRMAN; ROBERT L. MIKALSON, GEORGE D. ZAHN, JAMES M. BLAIR, SR., and IRVING CLARK, JR., their Officers, Agents and Employees, *Defendants*.

IRA R. GRANT, *Intervenor*.

M. C. BEATIE and TRANQUILLA KOZAK, *Additional Intervenors*.

This matter having come on for trial before the Court, without a jury, on the 22nd day of March, 1966; the following appearances having been made: Alfred J. Schweppe, of the firm of Schweppe, Reiter, Doolittle & Krug; C. Lee Coulter, of the firm of Coulter & Lee; W. R. Studley, of the firm of Studley & Purcell, Thomas L. Morrow, of the firm of Bogle, Gates, Dobrin, Wakefield and Long, representing plaintiffs;

John J. O'Connell, Attorney General, Delbert W. Johnson, Roger A. Gerdes and Charles E. Watts, all Assistant Attorneys General of the State of Washington, representing defendants; George M. Mack of the firm of Roberts, Shefelman, Lawrence, Gay & Moch, appearing amicus curiae on behalf of the following organizations: Washington Roadside Council, Inc.; Allied Arts of Seattle, Incorporated; Federal East Side Clubs of King County, Washington; Federation of Western Outdoor Clubs; Pacific Northwest Chapter, American Institute of Planners; The Seattle Garden Club; The State Association of the Daughters of the Pioneers of Washington; Vancouver Arts; Washington State Council of Architects, A.I.A., Inc.; Washington State Federation of Garden Clubs; and Washington State Federation of Women's Clubs; Thomas K. Cassidy, of the firm Bassett, Donaldson & Hafer, appearing as amicus curiae on behalf of the Sign Painters' Local Union No. 435, District Council of Carpenters of Seattle & Vicinity, Sign & Pictorial Painters' Local No. 403, Tacoma, Washington Hod Carriers and General Laborers' Union No. 242 and International Alliance of Bill Posters and Billers No. 49; Western Outdoor Markets, a California corporation appearing as amicus curiae through its attorney Anthony J. Quigley, of San Francisco; Intervenor Ira R. Grant appearing by his attorney Barrett White; and intervenors M. C. Beatie and Tranquilla Kozak appearing by their attorney Mr. W. R. Studley. Evidence, both oral and written having been presented; and Findings of Fact and Conclusions of Law having been entered; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

I.

Chapter 96, Laws of 1961 as amended by Chapter 3, Laws of 1st Extra Session 1963, codified as RCW

47.42, and known as the Highway Advertising Control Act of 1961, is constitutional under both the Constitution of the United States and of the State of Washington.

II.

The rules and regulations of the Washington State Highway Commission adopted pursuant to the above described statute, do not violate the plaintiffs' statutory or constitutional rights and are valid therefore.

III.

The Temporary Injunction issued by Judge Charles T. Wright of this Court on the 9th day of March, 1964, be and is hereby dissolved and of no further consequence.

IV.

That all reasonable and proper costs of this action be the obligation of plaintiffs herein.

Done in open court this 10th day of March, 1967.

HEWITT A. HENRY
Judge.

Supreme Court, U.S.
FILED
FEB 6 1969
JOHN F. DAVIS, CLERK

No. 648

IN THE

Supreme Court of the United States

October Term, 1968

MARKHAM ADVERTISING COMPANY, INC.; CASEY & STONE COMPANY; COLUMBIA BASIN OUTDOOR ADVERTISING CO.; NORTHWEST OUTDOOR ADVERTISING CORPORATION; OBIE OUTDOOR ADVERTISING, INC.; SUNSET OUTDOOR ADVERTISING COMPANY; YAKIMA VALLEY POSTER SERVICE, INC.; GROVER ADVERTISING INC.; individually and as a class,
Appellants,
FOSTER AND KLEISER, Division of METROMEDIA, INC.,
Plaintiff,
v.
THE STATE OF WASHINGTON; WASHINGTON STATE HIGHWAY COMMISSION AND THE HONORABLE MEMBERS THEREOF, CONSISTING OF ERNEST A. COWELL, CHAIRMAN; ROBERT L. MIKALSON, GEORGE D. ZAHN, JAMES M. BLAIR, SR., AND IRVING CLARK, JR., their Officers, Agents and Employees,
Appellees,
IRA R. GRANT,
Intervenor,
M. C. BEATIE AND TRANQUILLA KOZAK,
Additional Intervenors.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR REHEARING ON JUDGMENT OF DISMISSAL

ALFRED J. SCHWEPPE
THOMAS R. BEIERLE
Attorneys for Appellants

657 Colman Bldg.
Seattle, Washington 98104

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No. 648

IN THE

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October Term, 1968

MARKHAM ADVERTISING COMPANY, INC.; CASEY & STONE COMPANY; COLUMBIA BASIN OUTDOOR ADVERTISING CO.; NORTHWEST OUTDOOR ADVERTISING CORPORATION; OBIE OUTDOOR ADVERTISING, INC.; SUNSET OUTDOOR ADVERTISING COMPANY; YAKIMA VALLEY POSTER SERVICE, INC.; GROVER ADVERTISING INC.; individually and as a class,
Appellants,

FOSTER AND KLEISER, Division of METROMEDIA, INC.,
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v.

THE STATE OF WASHINGTON; WASHINGTON STATE HIGHWAY COMMISSION AND THE HONORABLE MEMBERS THEREOF, CONSISTING OF ERNEST A. COWELL, CHAIRMAN; ROBERT L. MIKALSON, GEORGE D. ZAHN, JAMES M. BLAIR, SR., AND IRVING CLARK, JR., their Officers, Agents and Employees,
Appellees,

IRA R. GRANT,
Intervenor,

M. C. BEATIE AND TRANQUILLA KOZAK,
Additional Intervenors.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR REHEARING ON JUDGMENT OF DISMISSAL

PETITION FOR REHEARING

The appellants respectfully petition for a rehearing of this court's order, entered January 13, 1969, dismissing the appeal herein for want of a substantial federal question.

The jurisdictional statement was filed and the case docketed on October 14, 1968.

No motion to dismiss for want of jurisdiction was filed by appellee under Rule 16 within thirty (30) days or any other time. While this fact is, of course, not determinative, it does indicate that appellees considered the federal questions substantial.

The judgment made herein on January 13, 1969, reads:

> "Dismissed for want of a substantial federal question."

There was no citation of authority. The court did not follow its standard practice of citing its previous decisions which are believed to be so conclusive as to render the questions unsubstantial.

This leaves the grounds of the decision open to conjecture only.

We are fully familiar with the test of substantiality as set forth in *Ex parte Poresky*, 290 U.S. 30, 32, and many other cases:

> "The question may be plainly unsubstantial because it is 'obviously without merit,' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.'"

Or, stated conversely, the federal question is "substantial" if:

> "We are unable to say that every question that appellants have brought here for decision is so clearly not debatable and utterly lacking in merit as to require dismissal for want of substance." *Hamilton v. Regents*, 293 U.S. 245, 258.

Or, otherwise stated:

> "The question is not so clearly lacking in merit that upon mere citation of our decisions it may be put aside as not requiring further consideration."
>
> *Alton R. Co. v. Illinois Commission*, 305 U.S. 548, 550;
>
> *Cheseboro v. Los Angeles County Dist.*, 306 U.S. 459, 463.

With the foregoing tests of substantiality in mind, let us examine the instant case.

The case involves a new statute, Washington State's Highway Advertising Control Act of 1961. Neither this act nor any one like it has ever been before this court before.

The questions believed to be substantial are:

1. Supremacy of the Federal Statute

The supremacy of the 1965 Federal Highway Beautification Act, Public Law 89-285, approved October 22, 1965, 79 Stat. 1028, over the Washington State act is a novel question before this court. The question has been ruled on by the Supreme Court of Georgia (*State Highway Department v. Branch*, 222 Ga. 770, 152 S.E.2d 372 (1966)), and by the Supreme Court of the State of Washington in the present case. They have reached exact-

ly opposite conclusions, the Washington court having refused to agree with the Georgia court.

When there is a division of opinion between the highest courts of two states as to the interpretation or application of a recent federal statute not yet construed by a federal court, it would seem to follow inevitably the federal question is substantial.

State police power measures are subject to the Supremacy Clause. When a state statute "collides with the federal Constitution or an act of Congress . . . the action of a state must give way by virtue of the Supremacy Clause. Article VI, Clause 2. There is such a collision here." *Morris v. Jones,* 329 U.S. 545, 553 (opinion by Mr. Justice Douglas).

The error of the Washington court is demonstrable from the language of the federal act ("just compensation shall be paid," "Nothing in this act . . . shall be construed to authorize private property to be taken . . . without just compensation") and the legislative history, both in House and Senate committee reports and legislative debate. *"The committees emphatically and unanimously reject the use of police power in acquiring these rights . . . such payment is mandatory, not permissive, on the states."* Senate Report No. 709, 89th Congress, first session, p. 7; House Report No. 1084, 89th Congress, first session, p. 7; Senate Report No. 542, 90th Congress, first session, p. 10; House Report No. 713, 90th Congress, first session, p. 5.

The impact of the 1965 Federal Act, if held to be supreme, would be substantial, as it would, among other things:

(a) Reject as invalid non-compensatory police power removal under the state act, and provide for just compensation, on sign removal;

(b) Provide a later removal time (1970) than the state act (immediate) on those signs lawfully in existence on September 1, 1965, as most of appellants' signs here were;

(c) Permit signs in commercial and industrial areas without regard to distance limitations.

In passing on this question the Washington court explicitly recognized, even quoted, the mandatory language in the 1965 act requiring just compensation to be paid, *Markam Adv. Co. v. State*, 73 W.D.2d 413 at 421. This mandatory language, found in the 1965 Federal Act, §131-(g) reads,

> "(g) Just compensation shall be paid upon the removal of the following outdoor advertising signs, displays, and devices—
>
> "(1) those lawfully in existence on the date of enactment of this subsection,
>
> "(2) those lawfully on any highway made a part of the interstate or primary system on or after the date of enactment of this subsection and before January 1, 1968, and
>
> "(3) those lawfully erected on or after January 1, 1968."

The federal share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

> "(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and
>
> "(B) The taking from the owner of the real property on which the sign, display, or device is located,

of the right to erect and maintain such signs, displays, and devices thereon."

The mandate appears again in §401:

"SEC. 401. Nothing in this Act or the amendments made by this Act shall be construed to authorize private property to be taken or the reasonable and existing use restricted by such taking without just compensation as provided in this Act."

In the face of the mandatory language, the Washington court strangely held "that the purpose of the federal statute is obviously to induce the states to act, not to require them to do so," and that the federal act was simply "directory" and not mandatory. 73 W.D.2d at 427.

Oddly, the state court, after quoting *the mandatory* provisions of the federal statute completely bypassed them, and, referring to other permissive features of the federal act, held that the *whole* federal act was directory. In so doing the state court disregarded the clear text of the statute itself, and ignored the Senate and House reports unqualifiedly expressing that mandatory intent.

A reading of the 1965 Federal Act will show that the holding of the Washington court is patently erroneous, and should be summarily reversed on this issue alone. We note that a ruling in favor of the appellants on this issue would be dispositive of all the other issues in the case, as it would render the state act wholly unenforceable and unworkable.

2. Denial of Due Process—Retroactive Taking of Property in a Legitimate Business Without Compensation

Moreover, as pointed out in the jurisdictional statement, even if the state can compel the removal of bill-

boards existing at the time of the passage of the state act and at all times since, even a state police power statute cannot operate retroactively to require removal of a structure which is not a nuisance in fact without requiring just compensation to the owner.

Well decided state cases hold that even though a legislature under its police power may require removal of certain structures, a police power statute cannot operate retroactively to require removal of a structure which is not a nuisance in fact and deny the owner just compensation. The attempt to do so is wholly confiscatory in violation of due process of law.

> *General Outdoor Advertising Co. v. Indianapolis*, 172 N.E. 309, 314 (Ind. 1930);
>
> *Stoner McCray System v. Des Moines*, 78 N.W. 2d 843, 850 (Iowa, 1956);
>
> *State Highway Dept. v. Branch*, 152 S.E.2d 372, 373-4 (Ga. 1966);
>
> *Vermont Salvage Corp. v. St. Johnsbury*, 133 Vt. 341, 34 A.2d 188, 196 (1943).

In *General Outdoor Advertising Company v. Indianapolis*, 172 N.E. 309, 314, the Supreme Court of Indiana said:

> "The legislature may enact regulations applicable to structures and uses which existed before the enactment, but, where such structures and uses are not nuisances *per se*, their removal and destruction cannot be ordered without just compensation."

This Indiana decision, opposed to the holding of the Washington State Supreme Court in the instant case, is set forth as a leading case in Stason, *Cases on Municipal Corporations*, Ch. 3, Sec. 2, pp. 229, 234 (American Case-

book Series). This Indiana case is cited with approval in the recent Iowa case above noted, and the same result is reached in Vermont and Georgia cases cited above.

This is the proper view under the Fourteenth Amendment, according to these state cases.

This great due process question is open in this court.

Indeed, this final issue—whether due process is violated by the application of police power to effect an extinguishment without compensation of legitimate business, not shown to be nuisances in fact or *per se*, conducted on private property—is one which this court should by all means accept as a substantial federal question, for the holding of the Washington State Supreme Court is squarely contradictory to the limitation imposed on police power under these circumstances in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 67 L.Ed. 322, 43 S. Ct. 158. In that case, this court held a statute restricting coal company's rights to mine so as to cause subsidence of property to be a taking, rather than a constitutional exercise of police power. The court, through Mr. Justice Holmes, stated in language applicable to the instant case:

> "The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth

Amendment. *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

"*The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.*" (Italics supplied)

The principle of the foregoing case not only supports the substantiality of this due process question, but if applied to the instant case, appears to require a reversal of the judgment below.

At any rate, when the state courts are sharply divided on the question whether lawfully-built pre-existing structures may be destroyed under the police power without compensation, it would appear that the question is, by any test, substantial.

3. Violation of First Amendment Rights

The degree of free speech protection to be accorded commercial advertising is open in this court and has "never been authoritatively determined." Mr. Justice Douglas in *Cammarano v. U.S.*, 358 U.S. 498, 513 footnote.

In *Valentine v. Chrestensen*, 316 U.S. 52, 86 L.Ed. 1262, 62 S. Ct. 920 (1940), a case involving the distribution of hand bills on public streets, Mr. Justice Roberts, writing for the court recognized the appropriate general rule.

"This court has unequivocally held that the streets

> are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. . . ."

but followed it with the statement:

> ". . . We are equally clear that the constitution imposes no such restraint on government as respects purely commercial advertising . . ." (316 U.S. at 54.)

This statement, as noted by Mr. Justice Douglas' concurring opinion in *Cammarano v. United States*, 358 U.S. 498 at 514, 3 L.Ed.2d 462, 79 S. Ct. 524 (1959), "has not survived reflection." Justice Douglas further observed:

> "The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise. Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive."

Not only is the broad statement in *Valentine* not applicable because the case deals with distribution of handbills on city streets, rather than a display on private property, but as Justice Douglas noted in *Cammarano* with respect to commercial advertising:

> "The extent to which such advertising could be regulated consistently with the First Amendment . . . has therefore never been authoritatively determined." 358 U.S. at 513, footnote.

This observation is borne out by the application of first amendment protection to other forms of enterprise. See *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S. Ct. 444, 80 L.Ed. 660 (1936), holding a tax on advertising

revenues to be violative of the First Amendment, *Thornhill v. Alabama*, 310 U.S. 88, 84 L.Ed. 1093, 60 S. Ct. 736 (1940), holding that picketing to redress labor grievances was protected by the First Amendment, as well as recent obscenity cases such as *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S. Ct. 631, 9 L.Ed.2d 584 (1962), and *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L.Ed.2d 649 (1964).

Billboard advertising as a means of exercising free speech must be viewed in the context of the stipulation heretofore referred to and quoted to the effect that:

> "Such advertising structures are used for advertising of primarily national; but some local, products by primarily national, but some local, advertisers. Said structures are also used for the purpose of conveying public messages by persons in public and private life, by churches and others. Said advertising structures are used as channels of communication, mostly commercial in nature, which reach many thousands of people every day. Also, the outdoor advertising company plaintiffs act as distributors for advertisements, political thought and messages, religious thought and messages, community thought and messages, and pleas of charitable organizations, and offer their facilities to the public for distribution of communications of all types." (Joint Stipulation, Ex. 37.)

Nor is there in the instant case any clear and present danger of destruction of life or property, invasion of the right of privacy, or breach of the peace, or indeed of *any* serious substantive evil which would justify the legislation. *Edwards v. South Carolina*, 372 U.S. 229, 9 L.Ed.2d 697, 83 S. Ct. 680 (1963). There is here no finding that any outdoor advertising structure is a nuisance, in fact or *per se*. At best there is only "implicit" finding, demonstrably false, that there is a relationship between highway

traffic safety and the presence of outdoor advertising structures.

The state conceded that it knew of no instance in which an accident had ever been attributed to the presence of a billboard, and offered no proof of any.

Because this state act, and the rules and regulations promulgated under it, permit some signs and prohibit others, require local advertisers to use one size print and national advertisers another, etc., there is also a substantial question as to whether the state act, as implemented, violates the equal protection clause of the Fourteenth Amendment, which forbids classification of free speech even where there may appear to be a rational basis for doing so. See *Board of Education v. Barnette,* 319 U.S. 624 at 639, 63 S. Ct. 1178, 87 L.Ed. 1628 (1943), and *Adams v. Hinkle,* 51 Wn.2d 763 at 784 *et seq.*, 322 P.2d 844 (1958).

The Washington court nevertheless affirmed the trial court's holding that the First Amendment was not violated by holding that the act was "a reasonable regulation" relying on the quotation from Mr. Justice Roberts quoted above which has already been characterized by Mr. Justice Douglas as not having "survived reflection." That is not sufficient to justify an infringement of freedom of speech, especially discrimination in its exercise.

The permits which must be obtained before a message may be displayed, and the reporting of changes in the advertising copy prior to making the change, and which permits are revocable by appellees for failure of the sign to conform to the regulations (and may also subject the permittee to criminal prosecution) are also a form of

unconstitutional prior restraint. *Lovell v. City of Griffin*, 303 U.S. 444, 58 S. Ct. 666, 82 L.Ed. 949 (1938).

All of these first amendment questions, not presently determined in the context of commercial off-highway advertising are so substantial as to warrant full briefing and consideration by this court.

4. Denial of Equal Protection

A part of the equal protection argument is implicit in the discussion of the free speech issue; it alone is sufficiently substantial to warrant the court's acceptance of jurisdiction.

In addition, the act and the rules and regulations promulgated thereunder are replete with instances of wholly arbitrary discrimination, which the Washington court dismissed without discussion.

> "We can conceive of a state of facts which justifies every classification here attacked, and this requires us to uphold the Act and the Regulations." 73 W.D.2d at 436.

But, there is no reasonable basis for the distinction made as to those signs which fall in the prohibited classes, and those which do not; the "classification" itself is so inconsistent and discriminatory that it is impossible to discern a class at all.

As examples:

(1) The act would permit an "on-premise" sign, while outlawing the same sign on an adjacent piece of property.

(2) The act singles out the business of outdoor advertising by partially prohibiting it in commercial and in-

dustrial areas where all other legitimate businesses may operate.

(3) Requires national advertisers to conform to limitations on letter size, while such limitations do not apply to local advertisers.

(4) Permits off-premises signs advertising local businesses, whereas a sign in the same location which advertised a national business would be prohibited.

(5) Non-located activities, such as political and charitable messages, are prohibited because they have no "location."

Further examples are legion; these suffice to show the range of discrimination in effect. Discrimination of this sort cannot be justified by different business characteristics when it has no reasonable relation to those differences, nor to the purposes of the statute. *Morey v. Doud*, 354 U.S. 457, 77 S. Ct. 1344, 1 L.Ed.2d 485 (1957).

The test set out in *Walters v. St. Louis*, 347 U.S. 231 at 237, 98 L.Ed. 660, 74 S. Ct. 505 (1954), is not satisfied:

> "Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that the different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary."

5. Denial of Due Process of Law—Invalid Exercise of Police Power

The due process issue is raised as the concomitant of the state act's being an invalid exercise of the police power. The argument directed to the inappropriateness

of this means of "regulating" the outdoor advertising business is separate from that raised in the federal supremacy argument, *supra,* as here the invocation of the police power is challenged on the grounds that it far exceeds the historical bounds of that doctrine.

Appellants' arguments proceed from the unchallenged premise that outdoor advertising is a "legitimate business," "an integral part of the business and marketing function and an established segment of the national economy." Senate Report 709, 89th Congress, first session, p. 6, on S. 2084, later the federal Highway Beautification Act of 1965. As such, it is not a nuisance *per se*. Nor is there any finding in this case that any sign is a nuisance in fact, which would provide a basis for the exercise of police power.

Appellants' business and structures affected are existing uses of private property. Removal of those structures destroys the value of the structures, impairs the value of the business and destroys the income-producing value of much of the land on which the signs are located. This business is conducted on private, not public, property.

The only support the Washington court found for this exercise of police power was the "implicit" finding of the trial court that there was a substantial relationship between traffic safety and the presence of highway outdoor advertising. A review of the trial court's Findings of Fact and Conclusions of Law clearly shows that the trial court never made a finding of a substantial relationship between traffic safety and outdoor advertising. Its finding (No. VII) merely says that there is "sufficient evidence to show that reasonable men could find that a relationship does

exist . . ."; *but there is no finding that it does exist; or that it is substantial* (Emphasis ours.) Rather, as noted in the court's Conclusions of Law (Nos. II and III), the court concluded: "There appears to be considered opinion both *pro* and *con*," and that "reasonable minds may differ as to whether the facts as found herein justify the exercise of the police power." Surely this does not accord with the requirement of a substantial relation to the object of the legislation, as set out in *Mugler v. Kansas*, 123 U.S. 623 at 661, 8 S. Ct. 273, 31 L.Ed. 205 (1887), and the line of cases since.

Nor is the police power properly invoked when it does not affect alike all persons similarly situated. *Mountain Timber Co. v. Washington*, 243 U.S. 219 at 237, 239, 37 S. Ct. 260, 61 L.Ed. 685 (1917).

If the state act is not a valid exercise of the police power, removal without compensation is thus patently a violation of due process, surely a matter of sufficient substance to warrant this court's exercise of jurisdiction in this cause.

CONCLUSION

We respectfully urge that the order of dismissal be vacated, and probable jurisdiction noted, or at least that the question of jurisdiction be passed to the merits.

Respectfully submitted,

ALFRED J. SCHWEPPE
Counsel of Record

THOMAS R. BEIERLE
Attorneys for Appellants

February 4, 1969
657 Colman Building
Seattle, Washington 98104

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for purposes of delay.

ALFRED J. SCHWEPPE
Counsel of Record

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

MARKHAM ADVERTISING CO., INC., ET AL. *v.* WASHINGTON ET AL.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 648. Decided January 13, 1969.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.